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Wisconsin Judicial Benchbook Volume V: Probate, Guardianship, and Mental Health

IN MEMORIAM

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Benchbook: Master Index

Pre-1993 ACKNOWLEDGMENTS

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USER'S GUIDE AND ABBREVIATIONS

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- H. Guardian of the person—one appointed to comply with the duties specified § 54.25(1) and to exercise any of the powers specified in § 54.25(2)
- I. Incapacity—inability of an individual effectively to receive and evaluate information or to make or communicate a decision with respect to the exercise of a right or power
- J. Individual found incompetent—an individual adjudicated by a Ct as meeting the requirements of § 54.10(3) found by clear and convincing evidence that all of the following are true:
- K. Minor—an individual who has not attained the age of 18 years, except permanent guardians may be appointed for an individual who is found incompetent and is at least 17 years and 9 months of age
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C. Additional requirements of petition if alleged that person not competent to refuse psychotropic medication

2. Notice

A. Failure to give proper notice of original petition deprives Ct of jurisdiction unless receipt of notice is waived

B. Must be given to proposed ward by personal service and to guardian, if any, by registered or certified mail or by personal service, at least 10 days before hearing

C. Must be served personally or by mail, at least 10 days before hearing, on the following:

D. Same notice requirements for rehearing to determine whether ward proper subject to continue under guardianship

3. Appointment and Duties of GAL

A. Ct must appoint GAL whenever guardianship petition or petition for receipt and acceptance of foreign guardian is filed, or whenever Ct reviews scope of guardianship, provides protective placement or orders protective services, reviews protective placement, terminates protective placement, expands guardianship order, reviews incompetency and terminates guardianship, reviews guardian's conduct, or at any other time that Ct determines necessary

B. GAL must advocate for best interests of proposed ward as to guardianship, protective placement, and protective services

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F. GAL may tell jury that GAL represents interests of proposed ward or ward

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H. GAL may appeal, may participate in an appeal, or may do neither

I. On Ct order, GAL must be allowed reasonable compensation paid from ward's income or assets, if sufficient, or, if insufficient, by Cty of venue

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A. Must be appointed in addition to GAL in all other guardianship petitions based on incompetency IF

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- C. If co-guardians appointed, default position is they must agree
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- D. Ct must hold preliminary hearing within 72 hours after detention, excluding weekends and legal holidays

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- D. Right to present and cross-examine witnesses

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- A. Individual is incompetent
- B. AND individual has primary need for residential care and custody
- C. AND individual so totally incapable of providing for own care or custody as to create substantial risk of serious harm to self or others
- D. AND disability permanent or likely to be permanent
- E. Findings, by clear and convincing evidence, that statutory elements for protective placement exist

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- A. Individual under a placement order may be transferred between protective placement units, protective placement facilities, and from protective placement unit to a medical facility
- B. Transfers may be made by guardian, Cty Dept, or agency with which Cty contracts
- C. Except in cases of emergencies, transfer cannot occur without guardian's written consent and, if transfer will be more costly to Cty, without Cty's written consent
- D. Notice of nonemergency transfers shall be given 10 days before transfer to Ct and to persons and entities who could have initiated transfer and shall include notice of right to Ct hearing to review transfer
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- C. GAL must be appointed, who must meet with individual, contact guardian, and report to Ct within 30 days after appointment
- D. Based on review of Cty report, GAL report, and guardian's report under Ch 54, Ct shall

10. Modification or Termination of Protective Placement and Services Orders

- A. Individual, guardian, GAL, legal counsel, Cty Dept, or other interested party may file a petition to modify or terminate an order of protective placement or service
- B. Hearing on the petition shall be within 21 days after filing, except that hearing is not necessary if within the previous 6 months there was a hearing on services, placement, or transfer. The hearing shall be subject to § 55.10
- C. After the hearing on modification or termination of protective placement, the Ct shall order one of the following
- D. After hearing on modification or termination of protective services, except order under § 55.14 for involuntary administration of psychotropic medications, Ct shall order

11. Psychotropic Medications

- A. Definitions
- B. Petition must meet all the requirements of § 55.075 and contain the following allegations:
- C. Hearing on the petition must be within 30 days after filing and must meet the requirements of § 55.105
- D. Ct must appoint GAL and counsel for individual and order independent medical or psychological examination relevant to the issues

- E. If allegations are proved by clear and convincing evidence, Ct may issue order authorizing guardian to consent to the involuntary administration of medications and may order the involuntary administration of the medication
- F. If order for medication is issued, Ct must order a treatment plan be developed for individual to be approved by guardian and Ct
- G. Ct must order individual to comply with treatment plan and, if there is noncompliance,
- H. Annual reviews
- I. Based on review of Cty report and GAL report, Ct shall

12. For Discussion of Rights and Records of Protectively Placed Persons, See MH 5

GA 4: GUARDIANSHIP OF ESTATE OF MINOR

- 1. Procedure
 - A. Minor—Definition
 - B. Guardian for estate of minor not required if
 - C. Jurisdiction and venue
 - D. Petition
 - E. Notice
 - F. Appointment of GAL or counsel
- 2. Hearing
 - A. Findings
 - B. Appointment of guardian
 - C. Guardian's bond
- 3. Duties of Guardian of Estate
- 4. Termination of Guardianship
 - A. Guardianship of estate of minor terminates when
 - B. Guardian may be removed for cause
- 5. For Guardianship of the Person of a Minor, See Juvenile Benchbook

GA 5: GUARDIANSHIP OF SPENDTHRIFT

- 1. Definitions
 - A. "Guardian"—"[A] person appointed by a Ct under § 54.10 to manage the income and assets ... of ... a spendthrift"
 - B. "Spendthrift"—"[A] person who, because of the use of alcohol or other drugs or because of gambling or other wasteful course of conduct, is unable to manage effectively his or her financial affairs or is likely to affect the health, life, or property of himself, herself, or others so as to endanger his or her support and the support of his or her dependents, if any, or expose the public to responsibility for his or her support"
- 2. Procedure
 - A. See GA 1
 - B. Petition
 - C. Notice
 - D. Hearing
 - E. Findings
- 3. Duties of Spendthrift Guardian
 - A. General duties

4. Review of and Removal of Guardian

5. Termination of Guardianship

- A. Guardianship terminated when
- B. For inventory and accounting requirements, see GA 1, Sec. 10.C.

GA 6: CONSERVATORSHIP

1. Appointment Proceedings

- A. Purely voluntary proceeding
- B. Venue in Cty of residence
- C. Ct must fix time and place for hearing
- D. Hearing
- E. Appointment of conservator NOT evidence of competency or incompetency of conservatee

2. Duties and Powers of Conservator

- A. Has all powers and duties of guardian of estate
- B. Existing DPA for the individual remains in effect unless the Ct for good cause revokes or limits the authority of the agent

3. Termination of Conservatorship

- A. Conservator's powers cannot be terminated without a hearing and the occurrence of one of the following
- B. Upon application of person under conservatorship, Ct must fix time and place for hearing
- C. Ct must find conservatee competent unless clearly shown to be incompetent and
- D. If conservatee found incapable of handling income and assets, Ct must

4. Conservator Fees

- A. Fees due Register in Probate at time of filing inventory or valuation documents
- B. Fees due conservator

GA 7: POWER OF ATTORNEY FOR HEALTH CARE

1. Definitions

- A. Health care means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition
- B. Health-care agent means individual designated by principal to make health-care decisions on behalf of principal or, if individual unwilling or unable to make those decisions, alternate individual designated by principal to do so
- C. Health-care decision means informed decision in exercise of right to accept, maintain, discontinue, or refuse health care
- D. Health-care facility means facility as defined in § 647.01(4) or any hospital, nursing home, community-based residential facility, Cty home, Cty infirmary, Cty hospital, Cty mental health center, or other place licensed or approved by DHS
- E. Incapacity means inability to receive and evaluate information effectively or to communicate decisions to extent that individual lacks capacity to manage health-care decisions; incapacity does NOT mean old age, eccentricity, or physical disability
- F. PAHC means designation by individual of another as individual's health-care agent for purpose of making health-care decisions on individual's behalf if individual cannot, because of incapacity
- G. Principal means individual who executes a PAHC

2. Appointment of Power of Attorney for Health Care

- A. Any competent person who has attained age 18 may appoint PAHC
- B. PAHC takes effect
- C. Examiners

3. Power of Attorney for Health Care Instrument

- A. Valid PAHCI must be all the following
- B. Photocopy or electronic facsimile copy presumed to be valid
- C. Printed form PAHCI
- D. PAHCI prepared by an Atty for a principal must contain either

4. Powers of Health-Care Agent

- A. Unless PAHCI otherwise provides, health-care agent known to health-care provider has priority over any individual other than principal to make health-care decisions
- B. Health-care agent MAY NOT consent to principal's admission as inpatient to
- C. Health-care agent MAY consent to admission of principal to
- D. Health-care agent MAY NOT consent, for principal, to
- E. Health-care agent MAY consent, for principal, to
- F. Health-care agent must act in good faith

5. Revocation of Power of Attorney for Health Care

- A. Principal may revoke PAHC at any time by doing ANY of following
- B. PAHC revoked and PAHCI is invalid if the agent at the time of execution is:
- C. If principal adjudicated incompetent in Wis and guardian is appointed, PAHC remains in effect
- D. If individual knows PAHC revoked

6. Safeguards and Penalties

- A. Nothing in Ch 155 prohibits individual from petitioning a Ct in Wis for determination of incompetency and for appointment of guardian for principal
- B. On receipt of PAHCI or statement of incapacity
- C. If a guardian is appointed for a principal who has executed a PAHC, the PAHC remains in effect, under § 54.46, unless revoked or modified by the Ct. The guardian of the individual may not make health-care decisions for the principal that may be made by the agent
- D. Any interested party may petition Ct assigned to exercise probate jurisdiction for Cty where principal present or Cty of principal's legal residence to review whether health-care agent performing duties in accordance with terms of PAHCI
- E. Penalties

MH 1: INVOLUNTARY MENTAL COMMITMENTS

1. Flow Chart

2. Elements for Involuntary Commitment

- A. Subject is mentally ill, developmentally disabled, or drug dependent
- B. Proper subject for treatment
- C. Subject is dangerous because subject
- D. See MH 3 for requirements for petitions for State prison inmates

3. Commencement of Action

- A. Three ways of commencing action
- B. Venue
- C. Contents of petition or statement
- D. Ct or Ct Comm'r must review petition or statement and issue detention order IF subject meets standard for commitment

- E. Legal counsel for subject
- F. Notice
- 4. Probable Cause Hearing Procedure
 - A. Before hearing
 - B. Time requirements
 - C. Time periods may be waived
 - D. Hearing requirements
 - E. Finding of probable cause satisfied by
- 5. Probable Cause Hearing Dispositions
 - A. If no probable cause, proceeding dismissed
 - B. Time periods may be waived
 - C. If probable cause to believe allegations
 - D. Conversion to Ch 55—If Ct finds probable cause to believe subject fit for guardianship and protective placement or services
 - E. If probable cause to believe subject fit for alcohol treatment under § 51.45(13)
 - F. Review of Ct Comm'r probable cause finding is de novo before Circuit Ct
- 6. Precommitment Medication
 - A. Medication may be administered during detention and before commitment
 - B. Ct may order medication when probable cause to believe subject
- 7. Examinations and Discovery
 - A. Examiners appointed if probable cause found
 - B. Requirements for examiners
 - C. Subject may nominate 1 of the 2 examiners and Ct may appoint nominated examiner, provided
 - D. Independent examinations
 - E. Examinations
 - F. Examiners' reports
 - G. Discovery
- 8. Final Hearing Procedure
 - A. Time periods may be waived
 - B. Time constraints if subject detained
 - C. Time constraints if subject NOT detained
 - D. Time constraints on final hearing
 - E. Notice
 - F. Jury
 - G. Procedure
 - H. Proof
- 9. Final Hearing Dispositions
 - A. Dismiss petition
 - B. Order commitment

- C. Order outpatient treatment only
- D. Prohibit possession of firearms
- E. If person found incompetent is Atty
- F. Authorize conditional release on medication
- G. Conversion. Order temporary guardianship and protective services or placement
- H. Length of commitment
- I. See MH 5 for rights of involuntarily committed persons

10. Transfers While Subject Is Under Commitment

- A. Cty Dept under § 51.42 or § 51.437 may transfer subject between treatment facilities or to community and from community to treatment facility if consistent with reasonable medical and clinical judgment
- B. Subject transferred from outpatient to inpatient status, or to more restrictive environment, may petition Ct in Cty where facility located or committing Ct to review transfer

11. Reexaminations and Extensions

- A. Reexaminations
- B. Extensions

MH 2: AODA COMMITMENTS

1. Emergency Commitment

- A. Standard for emergency commitment
- B. Commencement of action
- C. Detention order
- D. Subject's rights while detained
- E. Subsequent proceedings

2. Involuntary Commitment

- A. Standard for commitment
- B. Commencement of action
- C. Detention order on filing of petition
- D. Notification of rights

3. Preliminary Hearing

- A. Time constraints
- B. Subject to be represented by Atty
- C. Notice
- D. Procedure
- E. Findings
- F. Disposition
- G. Any review of Ct Comm'r finding is discretionary with Circuit Ct

4. Final Hearing

- A. Time constraints
- B. Notice
- C. Discovery
- D. Procedures

- E. Findings necessary for commitment
- F. Disposition
- G. Recommitment proceedings
- 5. Right to Refuse Medication and Treatment
 - A. See MH 5 for general rights of persons committed under § 51.45
 - B. Minor's rights
 - C. Subject has right to refuse medication and treatment if not ordered by Ct in original commitment
 - D. Hearing must be held within 10 days after filing of motion
 - E. At request of subject, subject's Atty, or Corp Counsel, hearing may be postponed up to 20 days after motion filed
 - F. Standard
 - G. Medication may be refused on religious grounds if member of recognized religious organization and religious tenets of such organization prohibit such medications and treatment
- 6. Special Provisions for AODA Commitment for Minors
 - A. Ct may appoint GAL
 - B. Parents or guardian must receive notice of all proceedings
 - C. Parent or guardian of minor subject has right to participate and be represented by Atty at all hearings
 - D. Hearing before Juv Ct

MH 3: CRIMINAL COMMITMENTS AND TRANSFERS

- 1. Criminal Commitment
 - A. For discussion of criminal commitments under § 971.14 (not competent to stand trial) and § 971.17 (NGI), see Criminal/Traffic Benchbook, CR 12 and CR 34
 - B. DHS, or Cty Dept under § 51.42 or § 51.437, may transfer care and custody of Def committed under § 971.14 or § 971.17 between treatment facilities or from a facility into the community, subject to § 51.35
- 2. Civil Commitment of Inmates of Prison, Jail, or House of Corrections
 - A. State prison inmate
 - B. Cty jail or house of corrections inmate
- 3. Transfers of Criminally Committed Defendants
 - A. DHS may, with approval of committing Ct and Cty Dept under § 51.42 or § 51.437, and subject to § 51.35, transfer to Cty Dept the care and custody of Def
 - B. Def transferred from outpatient to inpatient status, or to more restrictive environment, may petition Ct in Cty where facility located or committing Ct to review transfer
- 4. Transfers of Inmates from Prison, Jail, or House of Corrections
 - A. Emergency transfer
- 5. Transfers of Persons from Secured Juvenile Facilities
 - A. Pre-Ct procedure for voluntary transfer
 - B. Ct procedure for voluntary transfer
 - C. Procedure for involuntary transfer
 - D. Emergency transfers
- 6. Reexamination of Transferees
 - A. Right to reexamination under § 51.20(16) applies to prison, jail, or house of corrections inmate found to be mentally ill or drug dependent

B. If upon rehearing, Ct finds standards for recommitment under § 51.20(13)(g) no longer apply or inmate not in need of psychiatric or psychological treatment

C. Treatment beyond date of release

MH 4: VOLUNTARY MENTAL ADMISSIONS/ SETTLEMENTS

1. Purely Voluntary Admissions

A. Most voluntary admissions for mental illness, developmental disability, and drug dependence are accomplished without Ct involvement, on application of subject

2. Conversion from Involuntary Commitment Proceedings

A. Ct may permit person against whom petition for involuntary commitment filed, under § 51.15 or § 51.20, to become voluntary inpatient at treatment facility

B. Settlement agreements

C. Noncompliance with settlement agreement

D. Noncompliance hearing

3. Nonprotesting Admissions

A. Without signing application, person may be presumed to be voluntarily admitted for up to 7 days when

B. Ct hearing held if subject has not signed voluntary admission application within 7 days after admission

C. Facility may initiate involuntary commitment proceedings if it has reason to believe subject eligible for such commitment

4. Special Provisions for Minors

A. At any hearing required under Ch 51, parent or guardian of minor has right to participate in hearing and be represented by Atty

B. Emergency outpatient treatment for minors

C. Outpatient treatment for AODA

D. Voluntary outpatient treatment for mental illness

E. Voluntary admission to inpatient facility for AODA

F. Admission to approved inpatient facility for minors

G. Review procedure for petitions required under § 51.13(1) for admission of minor to inpatient treatment facility

H. Disposition in review of admission of minor for mental illness, developmental disability, alcoholism, or drug abuse

MH 5: PATIENTS' RIGHTS AND RECORDS

1. Applicability

A. Applies to any person

B. Does not include persons

C. Applies to subjects receiving services in outpatient and day-service facilities, as applicable

D. On admission, commitment, or transfer, patient must be informed orally and in writing of rights

2. Rights

A. Right to refuse to perform labor of financial benefit to facility where patient receiving treatment or service

B. Unrestricted right to send and receive sealed mail to or from

C. Right to send and receive sealed mail to or from other persons, subject to physical examination in patient's presence

D. Right to petition Ct for review of commitment order, withdrawal of order, or release from commitment as provided in § 51.20(16)

E. Right to least restrictive conditions

F. Right to treatment

G. Right to refuse medication and treatment

H. Right to be free from unnecessary or excessive medication at any time

I. Right to be free from physical restraint and isolation except for emergency situations or when isolation or restraint part of treatment program

J. Right not to be subjected to experimental research without express and informed consent of patient and guardian after consultation with independent specialists and Atty

K. Right not to be subjected to drastic treatment procedures without express and informed consent of patient after consultation with Atty and legal guardian, if any

L. Right to religious worship within facility, if available

M. Right to humane psychological and physical environment within facility

N. Right to confidentiality of treatment records; right to inspect and copy such records; and right to challenge accuracy, completeness, timeliness, or relevance of information in records, as provided in § 51.30

O. Right not to be filmed or taped unless signs informed and voluntary consent specifically authorizing filming or taping for particular purpose or project during specified time period

P. Have reasonable access to telephone

Q. Permission to use and wear own clothing or be furnished with adequate allowance of clothes if none available; provision to be made for laundering

R. Provision to be made for access to reasonable amount of individual secure storage space for own private use

S. Right to have reasonable protection of privacy in matters such as toileting and bathing

T. Permission to see visitors each day

U. Right to present grievances and communicate without justifiable fear of reprisal

V. Right to use own money as patient chooses, except to extent that authority over money is held by another (e.g., guardian of the estate)

W. Right to be informed in writing of costs of care and treatment that patient or relatives may need to pay

X. Right to be treated with dignity and respect by facility or program employees and by health-care providers

Y. Right to be notified in writing of grievance resolution procedure options if services provided by licensed mental health professional not affiliated with Cty Dept or treatment facility

Z. In Ch 980 commitment case, right to have Cty Dept submit § 980.08(4)(dm) report (for supervised release) within time frame specified in statute

AA. All legal rights except as provided in Sec. 3., *infra*

BB. Subject may at any time seek to be discharged by habeas corpus proceeding

3. Denial of Certain Rights

A. Rights guaranteed under Sec. 2.P.–T., *supra*, may be denied for cause after review by director of facility and may be denied when medically or therapeutically contraindicated as documented by patient's physician, licensed psychologist, or licensed mental health professional in treatment record

4. Grievance Procedure

A. Grievance procedure

B. Suit for damages

5. Patients' Records

A. Patient treatment records are confidential

B. Informed consent for disclosure of information required

- C. Informed consent NOT needed
- D. Subject's access to treatment records during treatment may be restricted
- E. Parent, guardian, or person in place of parent of minor, or guardian of adult adjudicated incompetent may consent to release of confidential information in Ct or treatment records
- F. See statute (§ 51.30) for complete details of record confidentiality

Wisconsin Judicial Benchbook Volume V: Probate, Guardianship, and Mental Health

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VOLUME V Probate, Guardianship, and Mental Health Seventh Edition

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IN MEMORIAM

RONNI G. JONES

April 12, 1941—November 7, 2002

The Wisconsin Judicial Benchbooks have borne the imprint of their Project Editor, Ronni Jones, since 1988 when Ronni first assumed this task for the Office of Judicial Education. In that time, the judges and lawyers of this state have benefited from her focused dedication to the creation and maintenance of a useful, practical resource for Wisconsin's trial judges. And those of us who had the good fortune to know and to work with Ronni have benefited from the friendship and collegiality of this vibrant, witty, and generous woman.

Ronni brought to her work a fierce intelligence and a logical and discerning approach to solving problems. Along with it came a marvelous sense of humor and a dry wit served up with a trace of a Brooklyn accent. Ronni was the genuine article. It was fun to see her discuss a case or a legal issue with a group. She was energized by the intellectual discussion, but always with a purpose; she unfailingly kept her eye on the practical goal of how the end product could be used to assist judges.

Ronni's commitment to judicial education is perhaps not surprising. When she entered law school at the age of 42, she had already combined raising a family with a history of work in training and education, and a track record of commitment to volunteerism and public service. She was married for 40 years to P. Charles Jones, a bright and

thoughtful Dane County judge who was himself a longtime member of the Civil Benchbook Committee. And she loved a challenge.

Warmth and humor infused Ronni's relationships with the people she knew and worked with. She was gracious and unpretentious, encouraging and delighting in conversation whether around the conference table or the dinner table. She was a facilitator in the best sense of the word; she wanted to include everyone in the discussion or in the gathering or in the party.

Ronni loved her work but more so the abiding friendships developed in the course of her work. We remember her with gratitude as a judicial educator who helped to make us better judges. And we remember her with fondness as a friend who, along the way, helped to make us better people.

The Wisconsin Judicial Benchbook Editorial Committees
April 15, 2003

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For online access to a master index of topics discussed in the Wisconsin Judicial Benchbooks, please go to <https://booksunbound.wisbar.org/w/wisbar/AE0025-MASTER.INDEX>.

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USER’S GUIDE AND ABBREVIATIONS

The Wisconsin Judicial Benchbooks are unique legal publications, designed as highly functional practice aids. Standard rules of sentence and punctuation have been modified to accommodate the terse outline style used throughout. Easy access to the text can be achieved in three ways: (1) through the comprehensive Table of Contents at the beginning of each volume, (2) through the Major and Minor Subject Tab System, and (3) through the Table of Contents at the beginning of each Minor Subject Tab.

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Citation Abbreviations

A2d	Atlantic Reporter, 2nd series
ABA Stds	American Bar Association Standards
ALR	American Law Reports
ALR2d	American Law Reports, 2nd series
ALR3d	American Law Reports, 3rd series
ALR4th	American Law Reports, 4th series
Am Jur	American Jurisprudence
Am Jur 2d	American Jurisprudence, 2nd series
CJ	Corpus Juris
CJS	Corpus Juris Secundum
Const	Constitution
Cr L	Criminal Law Reporter
F	Federal Reporter
F2d	Federal Reporter, 2nd series
FRCP	Federal Rules of Civil Procedure
FRCrP	Federal Rules of Criminal Procedure
FS	Federal Supplement
IRC	Internal Revenue Code
LEd2d	Lawyers Edition, 2nd series
OAG	Attorney General Opinion
P2d	Pacific Reporter, 2nd series
Pin	Pinney’s Wisconsin Reports
SCR	Wisconsin Supreme Court Rules
St	State
SW2d	South Western Reporter, 2nd series
USC	United States Code
USCA	United States Code Annotated
Wis Adm Code	Wisconsin Administrative Code
Wis JI-Cr	Wisconsin Jury Instructions, Criminal
Wis JI-Cv	Wisconsin Jury Instructions, Civil
Wis JI-Cr, SM	Wisconsin Jury Instructions, Criminal, Special Materials

Note: At times, the user will encounter citations that include abbreviations other than those listed above. The Benchbook format restricts printing the full, unabbreviated names. We regret any inconvenience this may cause, but we are confident that in most instances, the abbreviations are self-evident.

Text Abbreviations

AG	Attorney General
AOD	Alcohol and Other Drugs

AODA	Alcohol and Other Drugs Abuse
Asst	Assistant
Atty	Attorney
AV	Audiovisual
Bd	Board
Ch	Chapter
CHIPS	Child in Need of Protection or Services
CMV	Commercial Motor Vehicle
Co	Company
Comm'r	Commissioner
Corp	Corporation
Ct	Court
Cty	County
DA	District Attorney
Def	Defendant
Dept	Department
DHS	Department of Health Services
DL	Driver's License
DOA	Department of Administration
DOC	Department of Corrections
DOT	Department of Transportation
DPA	Durable Power of Attorney
DWD	Department of Workforce Development (formerly DILHR)
FCC	Family Court Commissioner
GAL	Guardian ad Litem
Gdnshp	Guardianship
ICJ	Interstate Compact on Juveniles
ICPC	Interstate Compact on the Placement of Children
ICWA	Indian Child Welfare Act
Ins	Insurance
JIPS	Juvenile in Need of Protection or Services
Juv	Juvenile
PA	Power of Attorney
PAHC	Power of Attorney for Health Care
PAHCI	Power of Attorney for Health Care Instrument
Prelim	Preliminary Hearing, Preliminary Examination
PSI	Presentence Investigation, Presentence Report
SPD	State Public Defender
Std	Standard
TPR	Termination of Parental Rights
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
US	United States
USDVA	United States Department of Veterans Affairs
Wis	Wisconsin

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PR 1: FORMAL PROBATE PROCEDURE**1. Jurisdiction**[§_879.01](#)**A. Jurisdiction generally invoked by verified petition****B. Jurisdiction of proceeding for administration of decedent's estate is as follows**[§_856.01\(1\)](#)*Daniels v. Draves**(Est of Daniels)*[53 Wis. 2d 611](#) (1972)

- 1) If decedent was domiciled in Wis, in Cty where decedent had domicile at time of death

[§_856.01\(2\)](#)

- 2) If decedent had no domicile in Wis, in any Cty in Wis where decedent's property located

Ct that first exercises jurisdiction under [§_856.01\(2\)](#) has exclusive jurisdiction

[§_868.01\(5\)](#)*Warner v Cir Ct**(In re Est of Warner)*[161 Wis. 2d 644](#)

(Ct. App. 1991)

- 3) If decedent had no domicile in Wis, Trial Ct's decision to grant or refuse original probate is an exercise of discretion

[§_856.07](#)**C. Who may petition**[§_856.07\(1\)](#)

1) Generally

- a. Any personal representative named in will or interested person under [§_851.21](#)
- b. Atty may not petition unless Atty is interested party

[§_856.07\(2\)](#)

2) After 30 days

- a. If no petition by proper person filed within 30 days after decedent's death, petition for administration may be made by
 - Any person who was decedent's guardian at time of decedent's death
 - Any creditor
 - Anyone who has cause of action or right of appeal that cannot be maintained without appointment of personal representative
 - Anyone with interest in property that is or may be part of decedent's estate

Theis v Short
(In re Est of Short)
[2010 WI App 108](#)
[328 Wis. 2d 162](#)

- Petitioner has burden to move action forward. Failure to comply may result in [§_805.03](#) dismissal, subject to petitioner's due-process rights

2. Substitution/Recusal of Judge

[§_801.58\(1\)](#), [§_757.19\(2\)](#)
St ex rel Sielen v
Milwaukee Cir Ct
[176 Wis. 2d 101](#) (1993)
Sharpley v Sharpley
(In re Est of Sharpley)
[2002 WI App 201](#)
[257 Wis. 2d 152](#)

A. Normal substitution/recusal rules apply

[§_801.58\(5\)](#)

B. In addition, may substitute for particular issue only

3. Appointment of Guardian ad Litem; Atty for Military Personnel

A. Guardian ad litem (GAL) for minors and incompetent persons

§ 879.23(1)

- 1) GAL must be appointed for any person interested who is minor or who is adjudicated incompetent and
 - a. Has no guardian of estate, or
 - b. Has guardian of estate, but
 - Guardian fails to appear on minor's or incompetent person's behalf, or
 - Guardian's interest adverse to that of minor or incompetent person

§ 879.15(1)

- 2) Minor or incompetent person must appear by GAL or by guardian of estate, who may appear by Atty, or by another person under doctrine of virtual representation as provided in § 879.23(5)

§ 879.23(1)

- 3) GAL may be appointed for persons not in being or presently unascertainable

§ 879.23(1)

- 4) GAL shall not be appointed or appear in same matter for persons whose interests differ

§ 879.23(2)

- 5) Ct may appoint GAL
 - a. When making order for hearing in the matter
 - Notice of appointment and hearing served on GAL

- b. On day of hearing before proceedings commence

§_879.23(3)

- 6) GAL must act throughout proceeding until proper distribution made to or for benefit of person represented, unless discharged earlier by Ct
- a. GAL discharged by Ct when minority or incompetency has terminated or when person represented no longer has interest in estate or matter
- b. If will creates a trust, GAL appointed in estate administration has no responsibility in regard to testamentary trust administration unless reappointed for that purpose

§_879.23(4)

- 7) Who may serve
- a. Except as in [paras. b.](#) and [c.](#) below, GAL to be either Atty admitted to practice in Wis or parent or child of the minor or incompetent person
- Parent or child of person to be represented may be appointed GAL only if Ct finds parent or child is Atty admitted to practice in Wis or is otherwise suitably qualified to perform GAL functions
- b. In probate of estate in which minor has interest unlikely to exceed \$10,000, GAL must be parent unless Ct finds no parent qualified and willing to serve
- If no parent qualified and willing to serve, GAL must be Atty as provided in [para. a.](#) above
- c. In probate of estate in which incompetent person has interest unlikely to exceed \$1,000, GAL must be parent unless Ct finds no parent qualified and willing to serve
- If Ct finds no qualified parent, GAL must be adult child of incompetent person, unless not qualified or unwilling to serve
 - If neither parent nor adult child qualified and willing to serve, Ct must appoint Atty as provided in [para. a.](#) above

- d. GAL may be allowed reasonable compensation and reimbursement for necessary disbursements in amount set by Ct and paid out of estate

Disch v Betz
(In re Est of Trotalli)
[123 Wis. 2d 340](#) (1985)

- While Ct not required to award reasonable compensation to GAL, it is erroneous exercise of discretion not to award reasonable compensation for reasonable services performed by disinterested Atty with no natural relationship to ward

[§_879.23\(5\)](#)

8) Virtual representation (alternative to appointing GAL)

- a. Ct may dispense with or terminate appointment of GAL for minor, incompetent person, or person not in being or presently unascertainable if there is living person who

- Is of full legal rights and capacity,
- Is party to the proceeding, and
- Has substantially identical interest

[§_879.25](#)

B. Atty for persons in military service

- 1) At time of filing petition for administration, affidavit must be filed showing whether any interested person actively engaged in US military service
- 2) If such interested person not represented by Atty or Atty-in-fact, Judge must appoint one to represent person and protect person's interest before any further proceedings held

Atty shall be admitted to practice in Wis and allowed compensation and necessary expenditures fixed by Ct and paid out of estate

4. Notice

[§_856.11](#)

A. When petition for administration filed, Ct must set time for

- 1) Proving the will, if any
- 2) Determining heirship, and
- 3) Appointing personal representative

B. Interested persons

- 1) Notice of hearing on petition must be given under [§ 879.03](#) with additional requirement that when any person interested is represented by GAL, notice given to both
- 2) Copy of will to be sent to all persons interested, except those whose only interest is as beneficiary of monetary bequest or bequest or devise of specific property

To those persons, notice of nature and amount of devise or bequest to be sent

[§ 851.21\(1\)](#)

- 3) Interested persons include
 - a. Heir of decedent
 - Includes issue of predeceased child (*See Intestate Succession, [PR 5, Sec. 1](#) (Basic Rules)*)
 - b. Beneficiary of will, including trustee
 - c. Beneficiary of trust created under will
 - d. Person named personal representative in will

Biart v First Nat'l Bank
(Est of Ogg)
[262 Wis. 181](#) (1952)

e. Atty named in will

*Dane Cty Humane Soc’y
v Union Tr Co
(Est of Goodrich)*
[271 Wis. 59](#) (1955)

f. AG, when certain charitable trusts involved

*Bellew v Holzknecht
(Est of Woelz)*
[9 Wis. 2d 458](#) (1960)

g. Beneficiary under prior will or beneficiary excluded from will by codicil

[§_851.21\(1\)](#)

h. Additional persons as Ct orders

*Winiarski v Miicke
(In re Est of Jank)*
[186 Wis. 2d 409](#)
(Ct. App. 1994)

i. Adopted children in certain circumstances

[§_879.03](#)

C. Notice—how given

[§_879.03\(1\)](#)
[RMC Form PR-101](#)

- 1) If notice required by law or deemed necessary by Ct or probate registrar, and manner of giving not directed by law, Ct or probate registrar must order notice given under [§_879.05](#)

Ct or probate registrar may order both service by publication and personal service on designated persons

[§_879.03\(2\)](#)

- 2) Following persons entitled to notice

a. Each person interested

b. Any GAL, guardian of estate, Atty, or Atty-in-fact for person in military service that represents any person interested

c. AG, when charitable trust under [§_701.0103\(4\)](#) or escheat under [§_852.01\(3\)](#) involved

[§_879.03\(3\)](#)

- 3) If petition shows or it appears that person interested is domiciliary of foreign country and address is unknown, Ct must cause notice of hearing petition or other proceeding to be given
 - a. To consul, vice consul, or consular agent of foreign country by mail to post-office address at least 20 days before hearing
 - b. If no consul, vice consul, or consular agent, Ct may mail notice to AG

§ 879.03(4)

- 4) If order does not specifically designate persons to whom notice given, order deemed to refer to persons set forth in petition or otherwise shown on record to be persons interested, and notice sent to post-office addresses shown

§ 879.03(5)

- 5) When post-office address of person interested not known or reasonably ascertainable, or names of persons interested are unknown, notice must so state and statement must be included in publication of notice

*Bank of Sturgeon Bay
v White (In re Est of
Phillips)*

[92 Wis. 2d 354](#) (1979)

See *Bank of Sturgeon Bay* case for good discussion of rights of unnoticed heirs

D. Notice—manner of giving

§ 879.05(1)

- 1) Unless particular statute provides otherwise, notice required

§ 879.05(2)

- a. By 1st class mail within or without Wis at least 20 days before hearing or proceeding upon any person whose post-office address known or can, with reasonable diligence, be ascertained

§ 879.07

- Proof of service by affidavit required of person who mailed notice, showing when and to whom and how notice addressed

§ 879.05(1), (4)

- First notice given by mail must be accompanied by notice by publication as class 3 notice in newspaper published in Cty, eligible under [Ch 985](#), as Ct by order directs
- Notice by publication in addition to mailed notice required for subsequent hearings if name or post-office address of one or more persons entitled to notice not ascertained

§_879.05(3)

- b. By personal service at least 10 days before hearing under §_801.11 except as provided for service by publication and except that substituted service under §_801.11(1)(b) may not be made outside Wis

§_879.07(2)

- Proof of personal service under §_801.10 or by written admission of service by person served if competent and an adult

§_879.13

E. Delayed service of notice

- 1) If for any reason notice to any person, including minor or incompetent person, is insufficient, Ct may
 - a. Order service of notice together with documents required under §§ 858.03 and 862.09

[RMC Form GF-131A](#)

- b. Appoint GAL when required
 - c. Order person or GAL to show cause why person should not be bound by action already taken as though timely served with notice
- 2) Such person may consent in writing to be bound by prior actions

§_879.09

F. Waiver of notice

- 1) Following persons may in writing waive service of notice

§_879.23(5)

- a. Persons who are not minors or incompetent persons, except by virtual representation. *See supra* [Sec. 3.A.8](#)
- b. Appointed GALs and guardians of the estate on behalf of themselves and those whom they represent

- 2) Atty or Atty-in-fact for person in military service may waive notice on own behalf but not on behalf of person Atty represents
- 3) Waiver of notice equivalent to timely service of notice

G. Effect of failure to give notice

Comment

Failure to give notice to interested party renders all orders and judgments entered not binding as to that party because Ct has no jurisdiction over parties in interest to whom no notice given

5. Determination of Heirs

A. Determination required

[§_863.23](#)

[RMC Form PR-1806](#)

- 1) Ct must determine heirs or heirship in every formal estate proceeding or when notice to creditors is required
 - a. After hearing properly noticed

[§_856.15\(2\)](#)

- b. Proof may be taken outside Cty
- 2) Petition for determination of heirs may be
 - a. Separate petition, or
 - b. Included in petition for administration, approval of final account, or final judgment

[§_879.03](#), [§_879.05\(4\)](#)

B. Notice of hearing

1) Notice as in [Sec. 4.](#), above

2) If there are unknown heirs or heirs whose address unknown, Ct may consider appointing a GAL through admission of will

[§_856.15](#), [§_863.23](#)

C. No determination of heirship made until testimony or deposition of at least one witness reduced to writing and filed

D. Contested hearing

Gertsch v Int'l Equity

Rsch (In re Est of

Katze-Miller)

[158 Wis. 2d 559](#)

(Ct. App. 1990)

1) Generally, personal representative files will and petitions for probate and heirship determination

2) Matter of heirship not contested until interested party contests proof filed by personal representative

St v Warnimont

(Est of Shega)

[38 Wis. 2d 269](#) (1968)

3) Documentary evidence must comply with rules of evidence to be admissible to prove heirship

[§_863.27](#)

E. Determination of heirship must be supported by findings of fact and included in final judgment

6. Creditors

[§_859.01](#)

A. When application filed, Ct must set date, by order, as deadline for filing claims against estate

3 to 4 months from date of order

[§_859.07](#)

B. Notice

[§_859.07\(1\)](#), [§_879.05\(4\)](#)

- 1) By publication as class 3 notice in newspaper published in Cty, eligible under [Ch 985](#), as Ct by order directs

[§_859.07\(2\)](#)

- 2) If decedent may have been obligated to State or Cty, or was patient or inmate at State or Cty facility, or if decedent or spouse ever received medical assistance under subch IV of [Ch 49](#), long-term community support services funded under [§_46.27\(7\)](#) (2017–18), aid under [§§_49.68, 49.683, 49.685, or 49.785](#), or other benefits specified in [§_859.07\(2\)\(a\)3.](#), written notice must be sent by registered or certified mail on forms provided by applicable Dept or Cty clerk at least 30 days before claim examination by Ct

[§_859.02\(2\)\(b\)](#)

Tulsa Prof'l Collection

Servs, Inc v Pope

[108 S. Ct. 1340](#) (1988)

Sears, Roebuck & Co

v Plath (In re Est of

Barthel)

[161 Wis. 2d 587](#) (1991)

- 3) Creditors known to personal representative in probate proceedings entitled to actual notice if names and addresses are “reasonably ascertainable”

[§_857.31](#)

- 4) No liability to any person for giving or not giving notice to any potential claimant

[§_859.02](#)

C. Limitation on filing claims is statutory

- 1) All claims against estate, including claims of Wis and any subdivision, whether due or to become due, absolute or contingent, liquidated or unliquidated, are forever barred against the estate, personal representative, heirs, and beneficiaries unless timely filed with Ct, EXCEPT

[§_859.02\(2\)\(a\)](#)

- a. Claims based on tort; or marital property agreement with time limitations under [§_766.58\(13\)\(b\)](#) and (c); Wis income, franchise, sales, withholding, gift, or death taxes; unemployment insurance contributions due or benefits overpaid; funeral expenses; administration expenses; claims by State under [§§_46.27\(7g\)](#) (2017–18), [49.496](#), [49.682](#), or [49.849](#), or claims by US
- b. Claims not barred under [§_859.02\(2\)\(b\)](#)

[§_859.03](#)

- c. Plaintiff with action pending against decedent at time of decedent’s death may, if action survives, serve notice of substitution of party Def on personal representative and proof of service of notice on Ct
 - Filing proof of service within time set in [§_859.01](#) gives plaintiff same rights against estate as filing of claim

§_859.33(1)

§_801.15(5)(a)

- 2) Claimant, in addition to filing claim with Ct, may within time for filing claims, serve copy of the claim on personal representative or Atty for estate to limit time within which objection may be asserted under §_859.33(1) to 60 days (plus 3 if mailed) after copy of claim was served on personal representative or Atty for the estate

If not served upon personal representative or Atty, they can object until entry of judgment on claim

§_859.02(3)

- 3) Failure of claimant to file timely claim against decedent's estate does not bar claimant from satisfying claim not otherwise barred from property other than decedent's estate assets

§_859.13

D. Form and verification of claim

- 1) No claim allowed unless

- a. In writing

- b. Describes nature and amount, if ascertainable

- c. Sworn to by claimant or someone for claimant that

- Amount is justly due or if not yet due, when it will or may become due
- No payments have been made that are not credited
- No offsets to affiant's knowledge, except as stated in written claim

- d. States claimant's post-office address

- e. If claim one for which property available under §_859.18, it shall describe which classification under §_766.55(2) applicable

- Classification of claims for which property available under § 859.18 subject to presumption that obligation incurred by spouse during marriage was in interest of marriage or family

2) If claim founded on written instrument that is available, original or copy with all endorsements must be attached

M&I Bank v First Am

Nat'l Bank (In re Est

of Alexander)

[75 Wis. 2d 168](#) (1977)

Language is directory, not mandatory

§ 859.29

E. Informing persons interested of claims

1) After last day for filing claims against estate expires, person interested in estate may make written request to personal representative or special administrator for statement listing all claims filed against estate

a. Statement must show

- Each claim
- Claimant's name
- Brief description of basis of claim
- Amount claimed

2) Within 5 days after receiving request, personal representative must mail or deliver copy of statement to requester, including guardian of estate, GAL, Atty, or Atty-in-fact for person in military service

3) Failure of personal representative or special administrator to comply does not affect Ct's jurisdiction as to persons interested

§ 859.25(1)

F. Priority of payment of claims and allowances

1) All claims and allowances, at time of allowance, must be classified

- 2) If applicable assets of estate insufficient to pay all claims and allowances in full, personal representative must make payment in following order
 - a. Costs and expenses of administration
 - b. Reasonable funeral and burial expenses
 - c. Provisions for decedent's family under §§ 861.31, 861.33, and 861.35
 - d. Reasonable and necessary expenses of decedent's last sickness, including compensation for persons attending decedent
 - e. All debts, charges, or taxes owing to US, Wis, or governmental subdivision or municipality of Wis
 - f. Wages including pension, welfare, and vacation benefits due to employees earned within 3 months before date of decedent's death, not to exceed \$300 per employee

§ 859.25(1)(g)

- g. Property assigned to surviving spouse or surviving domestic partner under § 861.41
- h. All other claims allowed

§ 859.25(2)

- 3) No preference given in payment of any claim over any other claim of same class, nor shall claim due and payable be entitled to preference over claims not due

§ 859.18

G. Payment of deceased spouse's obligations

- 1) At death of spouse, property under § 766.55(2) available to creditors for payment continues to be available, subject to following rules

§ 859.18(2), (3)(a)

§ 766.55(2)

- a. Except for obligations for credit extended or tax obligation to Wis, no income of surviving spouse available for payment of deceased's obligations

§_859.18(3)(b)

- b. Marital property of surviving spouse if available under §_766.55(2) available to extent of value of marital property at decedent's death

§_859.18(4)(a)

- c. If deceased spouse was only obligated spouse under §_766.55(2)(a) or only incurring spouse under §_766.55(2)(b)–(d), following property not available for claims

§_859.18(4)(a)1.

- Survivorship marital property except as provided in §_766.60(5)(b) and (c) if transferred to spouse

§_859.18(4)(a)2.

- Joint property with spouse subject to judgment lien upon which execution was issued

§_859.18(4)(a)3.

- Decedent's deferred employment benefits

§_859.18(4)(a)4.

- Life insurance proceeds not payable to estate or assigned to the creditor

§_859.18(5)

- d. Also available to creditors if also available under §_766.55(2) are

- Trusts under §_701.0505(1) (e.g., living trusts), but subject to §_701.0505(1)
- Spendthrift trusts, but subject to Subch V of [Ch 701](#) (i.e., §§_701.0501–.0509)
- Multiple and agency accounts, but subject to §_705.07

§_859.18(6)

- 2) Marital property agreements do not affect property available under §_859.18 unless property not available for satisfaction under marital property agreement while both spouses alive and agreement is binding on the creditor under §_766.55(4m) or §_766.56(2)(c)

H. Other kinds of claims against estate

§_859.19

1) Secured claims

- a. Creditor must describe security, and judgment allowing claim must describe security
- b. Full amount of claim paid if creditor surrenders security
- c. Difference between full amount of claim and fair value of security paid if creditor realizes on security before receiving payment

§_859.21

2) Contingent claims

- a. Amount or validity cannot be determined until some time in future (regardless of whether claim based on event in past or event that may occur in future)
- b. Must be filed in Ct and proved in same manner as absolute claims; if allowed, order of allowance must state nature of contingency
- c. Ct may provide for payment of such claims in any one of following ways

§_859.21(1)

- Creditor and personal representative may determine value of claim by arbitration, agreement, or compromise

§_859.21(2)

- Ct may order personal representative to distribute estate but to retain sufficient funds for up to 2 years to pay claim if it becomes absolute in future

— After 2-year period, distribution shall be made to distributees of such funds; distributees remain liable to creditors if claim subsequently becomes absolute

— Ct may require distributees to give a bond

§_859.21(3)

- Ct may order distribution of estate as if contingent claim did not exist; distributees liable if claim subsequently becomes absolute, and Ct may require distributees to give bond

§_859.21(4)

- Ct may also use other methods it deems appropriate

§_859.23

- Distributee or person furnishing bond for distributee not liable for amount exceeding proportionate share of estate subject to claim nor for amount greater than value of property that distributee received from estate

3) Tort claims or claims for contribution

§_859.45(1)

If within time limit for filing claims, claim is filed under §_859.01 or §_859.21, or continuance received under §_859.03, claimant will receive same protection as to payment as claimant filing claim required to be filed

§_859.45(2)

Claims not filed within time limit for filing claims against estate are not defeated, but failure relieves Ct of responsibility to protect claimant's rights, including protection provided under §_859.21

§_893.44(1)

4) Claims for personal services

2-year statute of limitation, generally

Nale v O'Dell

(*Est of Nale*)

[61 Wis. 2d 654](#) (1974)

Not applicable if no payment due until death or after

Caldwell v Caldwell

[5 Wis. 2d 146](#) (1958)

5) Claims for child support

- Claims for arrearage of child support are clearly claims against the estate

- b. Note: It has been argued that, if a payer dies before a Ct-ordered child support obligation ends, a claim for child support might be allowed (See Charles I. Phillips, *Does Death Terminate a Child Support Obligation?* 21 Wis J Fam L 81 (Oct 2001))

§_704.165

6) Claims for post-death rent

- a. Decedent's tenancy terminates the earlier of
- 60 days after the landlord receives notice, is advised, or otherwise becomes aware of the tenant's death, or
 - Expiration of the term of the rental agreement
- b. Other adult tenants are still responsible under the tenancy
- c. Landlord cannot contact decedent's family members for the purpose of obtaining rent for which family members have no liability

§_859.33(1)

I. Procedure for contest of claims

- 1) Following persons may contest a claim or assert offset or counterclaim in Ct
- a. Personal representative
- b. GAL
- c. Person interested with Ct approval
- 2) May do so only by mailing copy of objection, offset, or counterclaim to claimant or by personally serving copy upon claimant and filing it with Ct
- 3) Objection, offset, or counterclaim may be served at any time before judgment on claim

If claim served under [§_859.02\(1\)](#) on personal representative or Atty for estate to limit time for objections, then objection, offset, or counterclaim must be served or mailed to claimant and filed with Ct within 60 days after service or mailing of claim

4) Personal representative need not assert any offset or counterclaim in Ct

- a. If personal representative deems it in best interests of estate, personal representative may assert offset or counterclaim in separate action authorized by law outside these Ct proceedings
- b. Any offset or counterclaim so asserted deemed denied by original claimant

[§_859.33\(2\)](#)

5) If any claim, offset, or counterclaim contested

- a. Ct may require that issues be made definite
- b. Ct may fix date for pretrial conference
- c. Ct may direct manner in which pleadings, if any, are exchanged
- d. Ct must set time for trial on own or party's motion

[§_859.33](#)

[§_802.08](#)

[§_801.01\(2\)](#)

Holzman v Est of

Holzman (In re Est of

Holzman),

No 2018AP115, 2019 WL

476591, ¶¶ 11–15

(unpublished opinion not

citable per [§_809.23\(3\)](#));

see also *Est of Oaks*

v Stouff

(In re Est of Oaks)

[2020 WI App 29](#)

[392 Wis. 2d 352](#)

- e. Probate Ct may apply summary judgment procedure under [§_801.01\(2\)](#) to appropriate claims

[§_879.37](#)

Est of Wheeler

v Franco

(In re Est of Wheeler)

[2002 WI App 190](#)

[256 Wis. 2d 757](#)

- 6) Reasonable Atty fees and costs may be awarded out of estate to prevailing parties as objectors to contested claims within Ct's discretion

[§_859.37](#)
[RMC Form PR-1909](#)

J. Judgment on claims

- 1) Before setting time for hearing on final account, Ct must
 - a. Enter judgment on claims presented and offsets and counterclaims asserted
 - b. State how much to be allowed for or against the estate in each case
- 2) Judgment to set date by which payment to be made
- 3) If balance to any claimant in favor of estate, payment may be enforced like any other judgment

7. Appointment of Personal Representative

[§_856.23](#)

A. Persons who are disqualified

- 1) Any person, including personal representative named in will, not entitled to receive letters if
 - a. Under 18 years of age
 - b. Of unsound mind
 - c. Corporation not authorized to act as fiduciary in Wis
 - “Person” includes trust company bank under [§_223.03\(6\)](#)
 - d. Nonresident who has not appointed resident agent to accept service of process in all actions or proceedings with respect to the estate and filed the appointment with Ct

Recommendation

- Require bond for nonresident who is not disqualified

Bugbee v Donahue
[483 F. Supp. 1328](#)
 (E.D. Wis. 1980)

- Registered agent for out-of-state personal representative is not indispensable party to suit by estate

Keske v M&I Bank
(*Est of Keske*)
[18 Wis. 2d 47](#) (1962)

- e. Person whom Ct deems unsuitable for good cause shown

Saxe v Saxe
119 Wis. 557 (1903)

- Personal representative cannot be denied appointment just because heirs do not like nominee

[§ 856.23\(2\)](#)

- Nonresidency may be sufficient cause for nonappointment or removal of person in Ct's discretion

State ex rel First Nat'l
Bank & Tr Co of
Racine v Skow
[91 Wis. 2d 773](#) (1979)

- Other than in case of nonresidency, person can only be disqualified on grounds that pertain to capacity or competence to manage estate

Ruediger v Sheedy
(*In re Est of Ruediger*)
[83 Wis. 2d 109](#) (1978)

- If person has a conflict of interest

Klauser v Schmitz
(*In re Est of Schmitz*)
[2003 WI App 157](#)
[265 Wis. 2d 860](#)

— Conflict must be more than nominee's joint ownership of assets with decedent

[§ 856.21](#)
[RMC Form PR-1810](#)

B. Persons entitled to domiciliary letters

- 1) Letters shall be granted in this order to one or more of following persons who are not disqualified

- a. Personal representative named in will
- b. Any person interested in estate or interested person's nominee within discretion of Ct

- c. Any person whom Ct selects

C. Bond of personal representative

§ 856.25(1)

1) Generally

- a. Person shall not act as personal representative nor have letters issued to the person until
 - Bond given under [Ch 878](#), with one or more sureties, conditioned on faithful performance of duties, or
 - Ct appoints person without requiring bond
- b. If person not required to give bond before letters issued, Ct may require bond at any later time
- c. Requirement and amount of bond solely within discretion of Ct
- d. No bond required of any trust company bank, state bank, or national banking association authorized to exercise trust powers and in compliance with [§ 220.09](#) or [§ 223.02](#)

§ 856.25(2)

2) Two or more personal representatives

Judge may require no bond, take bond from each, take joint bond from all, or take bond from some but not all

§ 856.25(3)

3) Share of estate can stand as excess surety

If any distributee, including personal representative, stipulates to reduction of bond with distributee's share of estate as excess surety, Judge may reduce bond by that amount

§ 856.25(4)

- 4) Direction or request in will that personal representative serve without bond not binding on Ct

§_856.25(5)

[Sec. 895.345](#) requirement of justification of individual sureties does not apply to personal representative's bond

D. Attorneys

§_879.15(2)

- 1) Personal representative must appear by Atty

§_856.31

- 2) When corporate fiduciary appointed personal representative, Atty to be appointed to represent it in all proceedings
- 3) Persons receiving majority interest from estate may, within 30 days after appointment of corporate fiduciary as personal representative, select the Atty to represent it

E. Appointment of successor personal representative

§_857.21

- 1) If personal representative dies, is removed by Ct, or resigns, Ct may appoint new personal representative; if personal representative was also sole or last surviving personal representative and estate administration not completed, Ct shall appoint new personal representative

§_857.23

- 2) Successor has all rights and powers of predecessor, except may not exercise powers given in will that were personal to personal representative designated in the will

8. Inventory/Accounts

See [PR 3, Sec. 3](#)

9. Closing Estate

§_859.37

A. Judgment on claims must be filed

See [Sec. 6.J.](#), *supra*

B. Settlement of account

§_862.09

- 1) Upon filing of account, Ct must set date for hearing and give notice under [§_879.03](#)

§_862.11

- a. Copy of account sent to affected persons interested and to Attys for persons in military service; if person interested represented by guardian or GAL, copy sent to guardian or GAL but not to person

§_862.09

- b. If assets insufficient to pay all creditors, notice of that fact and of filing of account must be given to all creditors whose claims not disallowed

- c. Unless notice waived, account must be filed at least 3 weeks before hearing

§_862.13

- 2) At or before hearing, any person interested may file specific objection to any item or omission in account

*Astrach v First Nat'l
Bank (Est of Astrach)*
[25 Wis. 2d 331](#) (1964)

Objection must be specific or deemed waived

§_862.15

- 3) Ct must be satisfied of correctness and legality of account before allowing it
 - a. Personal representative at hearing may be examined under oath on any matter relating to account and settling of estate
 - b. Ct may refuse to approve account unless personal representative present at hearing

C. Fees and allowances

§_857.05

1) Allowances for expenses and services

- a. All necessary expenses in care, management, and settlement of estate

§_857.05(2)

- b. Commission for services, subject to approval of Ct

- Calculated at 2% of inventory value less any mortgages or liens plus net principal gains

— Rate dependent on agreement of decedent and personal representative, or if persons receiving a majority interest in estate and personal representative agree in writing

- c. Such further sums as Ct determines reasonable in cases of unusual difficulty or extraordinary services

Huehne v Huehne
(*In re Est of Huehne*)
[175 Wis. 2d 33](#)
(Ct. App. 1993)

- d. If derelict in duty, compensation for services may be reduced or denied

- See [PR 3, Sec. 5, Liability of Personal Representative](#), for additional material

§_857.07

- e. Costs

Sherman v Hagness
(*In re Est of Clatt*)
[195 Wis. 2d 225](#)
(Ct. App. 1995)

- 2) If personal representative also Atty, not entitled to professional rates for nonprofessional services

§_857.05(2), (3)

D. Atty fees

§_851.40
Crawford v Tierney
(*In re Est of Tierney*)
[70 Wis. 2d 438](#) (1975)

- 1) Atty fees based solely on value of estate improper, although value is some index of responsibility

Huehne v Huehne
(*In re Est of Huehne*)

[175 Wis. 2d 33](#)

(Ct. App. 1993)

a. Factors considered include

- Amount and character of service rendered
- Labor, time, and trouble involved
- Character and importance of litigation
- Amount of money or value of property affected
- Professional skill and experience required
- Ability of client to pay
- Pecuniary benefit derived from services

b. Determination of fees will be upheld unless erroneous exercise of discretion

Lontkowski Law Office

v Est of Konopka

(In re Est of Konopka)

[175 Wis. 2d 100](#)

(Ct. App. 1993)

- 2) Atty fees as percentage of gross inventory of estate must have some relevance to time spent on estate at reasonable hourly rate

[§_857.05\(3\)](#)

Sherman v Hagness

(In re Est of Clatt)

[195 Wis. 2d 225](#)

(Ct. App. 1995)

- 3) If personal representative or personal representative's law firm also serves as Atty for estate, Ct may allow personal representative's commission or Atty fees

- a. May allow both personal representative's commission and Atty fees
- b. Shall allow both if will authorizes

E. Final judgment

[§_863.25](#)

[RMC Form PR-1912](#)

- 1) Personal representative must file account and petition for hearing on final account and judgment assigning estate to entitled persons
 - a. Notice of hearing given under [§_879.03](#) unless waived

[§_879.05\(1\)](#)

- b. Notice must be given by publication if name or post-office address of one or more persons entitled to notice not ascertained

[§_863.27](#)

- 2) In final judgment, Ct must approve final account and assign property to person designated

- a. Findings of fact must include

- Determination of heirs
- Confirmation that jurisdictional requirements met
- Date of decedent's death and whether testate or intestate

[§_71.17\(3\), \(2\)](#)

[§_72.27, §_72.30\(3\)](#)

- Payment of State income and estate taxes and charges

[§_71.13\(3\)](#)

- Ct can make finding to waive income tax certificate when no tax due
 - Upon petition of designated person, trust, or other entity, confirmation of an interest in property passing by nontestamentary disposition under [§_705.15](#), [§_705.18](#), or [§_766.58\(3\)\(f\)](#)
 - Termination of any life estate in which decedent had interest at time of death
 - Survivorship rights of any joint tenants in property for which certificate of termination has not been issued
 - Decedent's interest in marital property for which certificate not issued
 - Upon petition of surviving spouse, confirmation of surviving spouse's 1/2 interest in marital property immediately before death of decedent spouse
- b. All tracts of real property with interest assigned or terminated shall be specifically described
- c. If fund withheld for payment of contingent claims, possible tax liability, or other reasonable purposes, Ct shall provide for distribution of fund if all or part not needed

[§_863.31](#)

3) Conclusiveness of final judgment

- a. Final judgment is conclusive determination of persons who are successors in interest and of extent and character of their interests, subject only to right of appeal and right to reopen

*Steussy v
First Wis Tr Co
(In re Est of Kennedy)*
[74 Wis. 2d 413](#) (1976)

- Final judgment can be modified or reversed upon establishment of passive or constructive fraud
- b. Final judgment is assignment or final adjudication of transfer of right, title, and interest of decedent to distributees

F. Distribution of estate

[§_863.27](#)

- 1) Distribution ordered in final judgment

[§_863.41](#)

- 2) Within 120 days after final judgment, personal representative must file with Ct receipts from distributees for all personal property assigned

[§_863.39\(1\)](#)

- 3) If legacy or property not claimed by distributee within 120 days after final judgment or time designated in final judgment, it is converted into money and paid to Wis school fund

[§_863.39\(2\)](#)

- a. If notice given to distributee in foreign country and no response within 120 days after entry of final judgment, property does not escheat but descends as intestate property

[§_863.39\(3\)](#)

- b. Within 10 years after date of publication, claimant may file petition with Ct and assert claim to the money

- Ct must hold hearing on 20 days' notice
- Before issuing order for distribution, Ct must issue order determining death tax due

[§_863.37](#)

- 4) If distribution of money or other property prohibited by laws, executive orders, or regulations of US, Ct may authorize disposition as permitted under those regulations

If money or property cannot be made to person entitled, deposited in Wis school fund

[§_857.31\(3\)](#)

- 5) Personal representative not liable for not informing distributees of potential liability for claims not barred

[§_863.47](#)

[RMC Form PR-1915](#)

G. Order of discharge of personal representative

- 1) Ct to enter order discharging personal representative and canceling personal representative's bond upon finding
 - a. Proof of recording of copy of final judgment or abridgement with register of deeds under [§_863.29](#), and
 - b. Filing of receipts from distributees for all other property assigned
 - Other evidence of transfer can be used if satisfactory with Ct

H. Execution and levies by distributees' creditors

[§_863.05](#)

- 1) No garnishment, attachment, execution, or levy can be made against estate property under any judgment or cause of action against distributee of estate

[§_863.46\(1\)](#)

Except creditor of debtor who has absconded from or is nonresident of Wis may petition to intervene to compel application of debtor's legacy or distributive share of an estate to payment of the debt

- 2) Proper procedure is appointment of receiver under [Ch 816](#) and [§_813.026](#)

[§_863.29](#)

[RMC Form PR-1914](#)

I. Recording of judgment

If final judgment involves interest in or debt on real property or shows termination of life estate or joint tenancy, personal representative must file copy of final judgment with register of deeds in Cty where real estate located

10. Dormant and Overdue Estates

[§_863.33](#)

A. Estates to be completed as soon as reasonably possible without unnecessary delay

[§_863.35\(1\)](#)

B. Dormant estates

- 1) Judge must order Atty and personal representative to show cause why final judgment not entered
- 2) Judge must proceed under [§_857.09](#) if under formal administration final judgment not entered in estate within 18 months after filing petition for administration and estate not open pursuant to order extending time

[§_863.49](#)

C. Inactive estates

- 1) Ct may by its own motion and without notice summarily discontinue any administration if no paper filed for more than 5 years

May also cancel bond

Theis v Short

[2010 WI App 108](#)

[328 Wis. 2d 162](#)

- 2) Ct may, by its own motion and with proper notice, terminate administration if a petitioner's failure to prosecute is extreme, substantial, and persistent. Burden is on petitioner to move the case forward

D. Overdue estates

[§_857.09](#)

When personal representative has failed to perform duties, Ct may remove and replace personal representative and Atty representing personal representative

11. Demand for Formal Proceeding

[§_865.03\(1\)](#)

- A. Formal proceedings may be initiated by personal representative in informal proceeding or by any interested person**

[§_865.03\(2\)](#)

- B. Statute requires suspension of powers of personal representative while matter is formal**

- C. If demand is for particular issue, after Ct completes formal portion of proceeding, matter reverts to informal**

12. Appointment of Special Administrator

§ 867.07
§ 856.27

See [Sec. 5](#) in **PR 8** for discussion of **Special Administration**

PR 2: WILLS

CAUTIONARY NOTE:

The Probate Code was revised by 1997 Wis. Act 188 and is effective for all those who died after 1/1/99 and for those whose rights were established by **irrevocable** governing instruments executed after 1/1/99.

1. Formalities of Wills

A. Execution

§ 853.03

- 1) Will must be in writing

§ 868.01(5), § 902.02

Dennis v Circuit Ct

(In re Est of Warner)

[161 Wis. 2d 644](#)

(Ct. App. 1991)

- a. Holographic wills not generally recognized as valid in Wis, but Wis Ct must take judicial notice of law of domiciliary state that gives legal validity to holographic will offered for probate in Wis

- A holographic will is a will written in the testator's own handwriting without witnesses

§ 853.03

DeThorne v Gibson (In re

Est of DeThorne)

[163 Wis. 2d 387](#)

(Ct. App. 1991)

- b. Will must be signed by

- Testator, or

§ 853.03

- Testator, with assistance of another and with testator's consent
- In testator's name by another person

— At testator's express direction

§_853.03(2)(c)

— In testator's conscious presence, which includes the simultaneous remote appearance by 2-way, real-time audiovisual communication technology, subject to the conditions set forth in §_853.03(2)(c), and

- c. Will must be signed by at least 2 witnesses who will sign within reasonable time after any of the following:

§_853.03(2)(c)

- Signing by testator in conscious presence of witness
- Testator's acknowledgment of own signature
- Testator's acknowledgment of will

Note: Witnesses may observe the signing or acknowledgment at different times.

§_853.07(2)

- d. Beneficiary may sign as witness so long as there is at least one other witness

- However, any beneficial provisions of will for witness or witness's spouse invalid to extent such provisions in the aggregate exceed in value what witness or spouse would have received had testator died intestate unless either

§_853.07(2)(c)

— Will is also signed by 2 disinterested witnesses

— There is sufficient evidence that testator intended full transfer to take effect

Malnar v Stimac
(*In re Est of Malnar*)
[73 Wis. 2d 192](#) (1976)

- e. Proof of due execution of will creates presumption of validity

- f. Proof of due execution creates rebuttable presumption that testator understood contents of the document executed

§ 853.03

Johnson v Merta

(*In re Est of Dejmal*)

[95 Wis. 2d 141](#) (1980)

- g. No Wis requirement that testator expressly declare document to be own will or to specifically ask proposed witnesses to sign as witnesses to will

§ 853.04(1)

- h. Will may be made self-proved by affidavit of testator and witnesses and such affidavit is conclusive evidence of execution

B. Joint wills

Salvesen v Cordes

(*Est of Cordes*)

[1 Wis. 2d 1](#) (1957)

- 1) Joint wills are valid in Wis

Biesiadecki v Stala

(*In re Est of Warunek*)

[159 Wis. 2d 129](#)

(Ct. App. 1990)

- 2) Joint will invalid if expressly or impliedly does not become effective until death of survivor
- 3) Joint will that cannot be separated as will of each maker should not be probated

When determining whether will may be probated separately, Ct bound to consider meaning and legal effect of language of instrument in light of circumstances existing at time of execution

- 4) No statutory or other prohibition against witness signing as testator in joint will provided there are sufficient other witnesses not to limit recovery

§ 853.13

Pindel v Czerniejewski

(*In re Est of*

Czerniejewski)

[185 Wis. 2d 892](#)

(Ct. App. 1994)

- 5) Joint wills are not contractual unless contract clearly established

C. Incorporation by reference

§_853.32

- 1) Will may incorporate by reference another document if
 - a. Will expressly or as construed by extrinsic evidence manifests intent to incorporate, and
 - b. Other document in existence when will executed, and
 - c. Other document sufficiently identified in will, and
 - d. Will properly executed

§_853.32(1)(bm)

- 2) Incorporated document need not be executed in the same manner as the will

§_853.32(2)

- 3) Except tangible personal property and digital property as defined in §_711.03(10) not mentioned in will may be disposed of by another document specifically referred to in will even if document undated or is created after date of will

§_853.05

D. Foreign wills

- 1) Will executed in foreign jurisdiction admissible if executed in compliance with Wis statutes
- 2) Also valid if executed in compliance with law at time of execution or death of
 - a. Place where will executed
 - b. Place where testator resided or was domiciled or was a national

E. Statutory wills

- 1) Two valid will forms created by statute

§_853.55

- c. Basic will

§_853.56

- d. Basic will with trust

§_853.51(1)(a)1., (2m)

- 2) Failure to comply with instructions in a will, other than the requirements for the testator's and witnesses' signatures, does not affect the validity of the will

§_853.13

F. Contracts

- 1) Contract to make will or not to revoke will or die intestate established only by
 - a. Will stating material provisions of contract, or
 - b. Express reference in will to contract and extrinsic evidence proving terms, or
 - c. Valid written contract, or
 - d. Clear and convincing extrinsic evidence

2. Proof of Will

§_856.13

A. No will can pass any property unless it has been proved and admitted to probate

§_856.15(1)

B. If will uncontested, 2 methods of proof

- 1) Sworn statement of subscribing witness, or

§_856.15(2)

Proof may be taken in open Ct in any Cty or before Probate Ct in any state or US territory

- 2) Without witness, at Ct's discretion, if will contains attestation clause showing compliance with will execution requirements under §_853.03 or §_853.05 or includes an affidavit in substantially the form under §_853.04(1) or (2)

§_853.04, §_856.16

C. If affidavit re: execution is attached to will, it is conclusive evidence of proper execution

§_856.17

D. Proof of missing will

- 1) If will lost or destroyed without testator's consent, unavailable but revived under §_853.11(6), or otherwise missing, Ct may take proof of execution and validity

Fonk v Zastrow

(*Est of Fonk*)

[51 Wis. 2d 339](#) (1971)

- 2) If testator died having executed otherwise-valid will last known to have been in testator's possession, and which cannot be found at death, prima facie rebuttable presumption that testator destroyed it with intent to revoke
- 3) In petition under §_856.17, copy of will to be filed and to state on it that it is a copy

§_853.11(1)

3. Revocation of Will by Act or Law

A. Revoked by subsequent writing or physical act

- 1) Will revoked in whole or in part by

§_853.11(1)(bm)

- a. Subsequent will executed in compliance with §_853.03 or §_853.05 that revokes prior will or part expressly or by inconsistency or if subsequent will completely disposes of estate

§_853.13

Pindel v Czerniejewski

(*In re Est of*

Czerniejewski)

[185 Wis. 2d 892](#)

(Ct. App. 1994)

- Exception: Previous joint will with contract not to revoke may prohibit revocation if such contract clearly established

§_853.11(1m)

Lonsdorf v Citizens St

Bank & Tr Co

(*Est of Erbach*)

[41 Wis. 2d 335](#) (1969)

Helgert v Luedke

(*Est of Helgert*)

[29 Wis. 2d 452](#) (1966)

- b. Burning, tearing, cancelling, obliterating, or destroying will or part, with intent to revoke, by testator or someone in testator's conscious presence and by testator's direction

§_853.11(1)(bm)1.

- c. Subsequent will revokes prior will without revocation provision if testator intended subsequent will to replace rather than supplement prior will

§_853.12

B. Entitlement of surviving spouse or domestic partner

- 1) If testator married surviving spouse or recorded a domestic partnership under [Ch 770](#) with the surviving domestic partner after will execution spouse or domestic partner entitled to share of estate
 - d. Share of surviving spouse or surviving domestic partner is equal to intestate share of net estate minus devises to testator's children born before marriage who are not also children of spouse or surviving domestic partner and devises to issue of such children
- 2) Surviving spouse or surviving domestic partner not entitled to share of estate if
 - a. It appears from will or other evidence that will made in contemplation of marriage or domestic partnership with surviving domestic partner, or
 - b. It appears from will or other evidence will to be effective notwithstanding marriage or domestic partnership, or
 - c. Evidence indicates that post-marriage or post-domestic partnership revision of will was contemplated but rejected by testator, or
 - d. Testator provided for spouse or domestic partner outside will and intent of testator is clear, or
 - e. Testator and spouse have marital agreement limiting rights of spouse

§_853.11(3), §_854.15

C. Revoked by annulment or divorce

- 1) Any provision in will in favor of testator's former spouse and relatives of former spouse revoked by annulment or divorce as if former spouse and relatives of former spouse disclaimed
- 2) Any provision in a will in favor of testator's former domestic partner revoked by termination of domestic partnership or other event as if former domestic partner had disclaimed
- 3) Revocation not effective if

- a. Express terms of a governing instrument, Ct order, or contract provide otherwise, or
- b. Divorce or annulment is nullified, or
- c. Parties remarry or enter into new domestic partnership, or
- d. There is a finding of decedent's contrary intent

§_853.11(3m)

§_852.01(2m)

D. Revoked by intentional killing of decedent by beneficiary

§_854.14

- 1) If beneficiary unlawfully and intentionally killed decedent, interest that beneficiary would have had is treated as if beneficiary had disclaimed all revoked provisions unless Ct decides that decedent's wishes would best be carried out by alternative disposition of decedent's property or decedent provided in will, by specific reference to §_854.14, that this section does not apply

Lemmer v. Schunk

(*In re Est of Schunk*)

[2008 WI App 157](#)

[314 Wis. 2d 483](#)

- a. Assisting another person to commit suicide is not an act of "unlawful and intentional killing"
- b. Conviction for unlawful and intentional killing conclusive to revoke beneficiary's right to take under will
- c. Final adjudication of delinquency for intentional killing of decedent revokes Juv's rights to take under will
- d. In absence of conviction, Ct may determine whether there is clear and convincing evidence that the killing was unlawful and intentional

Gedlen v Unborn

Children

(*In re Est of Safran*)

[102 Wis. 2d 79](#) (1981)

Jackson v Gray

(*In re Est of Jackson*)

[186 Wis. 2d 439](#)

(Ct. App. 1994)

- 2) See cases for discussion of common law and Wis legislative and case law development

§_853.11(6)

E. Revival of will

- 1) If subsequent will partly revoked previous will and subsequent will revoked by physical act, revoked parts of previous will revived unless testator's intent shown to the contrary

§_853.11(6)

- 2) If subsequent will totally revoked previous will and subsequent will revoked by physical act, previous will remains revoked unless revived by establishing testator's intent for previous will to take effect
- 3) If subsequent will partly or totally revoked previous will and subsequent will revoked by another will, previous will remains revoked unless revived by terms of later will or proof of testator's intent to revive previous will or its revoked part
- 4) If previous will lost or accidentally destroyed, validity of revived will may be established by [§_856.17](#)

4. Will Contest

Bermke v Sec First Nat'l

Bank (Est of Elvers)

[48 Wis. 2d 17](#) (1970)

Sharpley v Sharpley

(In re Est of Sharpley)

[2002 WI App 201](#)

[257 Wis. 2d 152](#)

A. No right to jury trial

B. No special pleadings to demonstrate grounds or to join issues for contest

C. Grounds, generally

- 1) Submitted document not last will of decedent
 - a. Ct must adjudicate most recent will first
- 2) Will lacks testamentary formalities. *See supra* [Sec. 1](#)

[§_853.01](#)

- 3) Decedent lacked testamentary capacity to make will
 - a. Not 18
 - b. Not of sound mind

- 4) Will procured by fraud or undue influence. *See infra* [Sec. H.](#)

D. Who may contest will

Bellew v Holzknecht

(*Est of Woelz*)

[9 Wis. 2d 458](#) (1960)

- 1) Any person having substantial interest or right of which person would be deprived if purported will admitted to probate, may contest

Hayden v Nuzum

(*Will of Keenan*)

[188 Wis. 163](#) (1925)

- 2) Although will denies beneficiary right to take under will if beneficiary contests, beneficiary who contests in good faith and with probable cause may take under will admitted to probate

Patterson v Jensen

(*Will of Faulks*)

[246 Wis. 319](#) (1945)

E. Burden of proof

- 1) Proponent has initial burden to establish prima facie case that
 - a. This is the last will
 - b. Formalities of execution met
 - c. Decedent had testamentary capacity at execution
- 2) Burden shifts to opponent as proponent rests
 - a. Opponent given full opportunity to demonstrate objection
 - b. Original proponent accorded full presentation as if that person were Def
 - c. If grounds are lack of mental capacity or undue influence, burden shifts to opponent, but back to proponent if sufficient proof presented

Gittel v Abram

(*In re Est of Persha*)

[2002 WI App 113](#)

[255 Wis. 2d 767](#)

- But see discussion in *Persha*

F. Testamentary formalities

Malnar v Stimac
(*In re Est of Malnar*)
[73 Wis. 2d 192](#) (1976)

- 1) Will that appears duly executed is rebuttably presumed to be

[§_903.01](#)

- a. Presumption alone will not prevail against testimony that will was not properly executed

[§_856.16](#), [§_853.04\(3\)](#)

- b. Self-proving affidavit included in will is conclusive evidence of valid execution

G. Testamentary capacity, generally

[§_853.01](#)

- 1) Any person may make or revoke will if

- a. 18 years or older

- b. Of sound mind

Manske v Wright
(*Will of Wright*)
[266 Wis. 89](#) (1954)
Est of Staab
[166 Wis. 587](#) (1918)

- 2) Mental capacity presumed as fact of normal mind until contrary is shown

- a. If mental illness or lack of testamentary capacity before execution of will can be shown, legal rebuttable presumption has been established that condition continued

Sorensen v Ziemke
(*In re Est of Sorensen*)
[87 Wis. 2d 339](#) (1979)

- May be rebutted by establishing a lucid interval

Gittel v Abram
(*In re Est of Persha*)
[2002 WI App 113](#)
[255 Wis. 2d 767](#)

— But see discussion of rebuttable presumptions in *Persha*

Gill v Ruk (Will of Zych)
[251 Wis. 108](#) (1947)

b. Presumed that testator knew contents of will

O'Brien v Lumphrey
(*Est of O'Loughlin*)
[50 Wis. 2d 143](#) (1971)

3) Testator needs sufficient capacity to comprehend

a. Nature

b. Extent

c. State of affairs of testator's property

d. Relationship with persons who might reasonably be expected to be beneficiaries

e. How provisions of will may affect beneficiaries and legatees

- Must be able to contemplate these matters for sufficient period of time to form rational judgment in relation to them, and so express them in will

4) Perfect memory not required

Becker v Zoschke
(*In re Est of Becker*)
[76 Wis. 2d 336](#), 345
(1977)

- 5) "[T]he general mental condition of one who executes a will is only peripherally relevant, for a person may have a general or usual condition of inability to comprehend and yet have lucid intervals during which time there is demonstrated testamentary capacity and a will may be appropriately executed."

Malnar v Stimac
(*In re Est of Malnar*)
[73 Wis. 2d 192](#) (1976)

6) Due execution raises rebuttable presumption that testator understood contents of will

Fischbach v Knutson
(*Est of Von Ruden*)
[55 Wis. 2d 365](#) (1972)

7) Testator need not know exact value of assets, nor need testator detail or itemize assets

Wegner v Wegner
(*Est of Wegner*)
[185 Wis. 407](#) (1925)

8) Testamentary capacity determined at time of will execution

Testator need not maintain competency before or after execution

9) Appointment of guardian is not controlling regarding testamentary capacity

Sorensen v Ziemke
(*In re Est of Sorensen*)
[87 Wis. 2d 339](#) (1979)

10) Contestants on grounds of mental capacity must establish facts by clear, satisfactory, and convincing evidence

H. Undue influence

1) Two methods to establish undue influence

a. First method (4-element test)

Becker v Zoschke
(*In re Est of Becker*)
[76 Wis. 2d 336](#) (1977)

- Testator's susceptibility to undue influence
- Opportunity to influence

Sensenbrenner v Sensenbrenner (*In re Est of Sensenbrenner*)
[89 Wis. 2d 677](#) (1979)

- Disposition to influence

Lee v Kamesar
(*In re Est of Kamesar*)
[81 Wis. 2d 151](#) (1977)

- Coveted result achieved

b. Second method (2-element test)

Malnar v Stimac
(*In re Est of Malnar*)
[73 Wis. 2d 192](#) (1976)

- Confidential or fiduciary relationship between testator and favored beneficiary, and

- Suspicious circumstances surrounding making of will

Patterson v Jensen
(*Will of Faulks*)
[246 Wis. 319](#) (1945)

2) Basic question always whether free agency of testator destroyed

3) Factors relevant to 4-element test

Lee v Kamesar
(*In re Est of Kamesar*)
[81 Wis. 2d 151](#) (1977)

a. Testator's susceptibility

- Age
- Personality
- Physical health
- Mental health
- Ability to handle business matters

Johnson v Merta
(*In re Est of Dejmal*)
[95 Wis. 2d 141](#), 156–57
(1980)

- “If consideration of these factors demonstrates that the testator was unusually receptive to the suggestion of others and consistently deferred to them on matters of utmost personal importance, then the first element is established”

b. Opportunity to influence

Zelner v Krueger
(*In re Est of Evans*)
[83 Wis. 2d 259](#), 282
(1978)

c. Disposition to influence

- “[M]ore than a desire to obtain a share of the estate, it implies grasping and overreaching and a willingness to do something wrong and unfair”

d. Coveted result

Johnson v Merta
(*In re Est of Dejmal*)
[95 Wis. 2d 141](#), 159
(1980)

- “The essential question is whether that person has, for no apparent reason, been favored in the will to the exclusion of a natural object of the testator’s bounty.”

Hoefl v Friedli
(*In re Est of Friedli*)
[164 Wis. 2d 178](#)
(Ct. App. 1991)

4) Factors relevant to 2-element test

- Objector to establish first element: existence of a confidential or fiduciary relationship between testator and favored beneficiary

Wickert v Burggraf
[214 Wis. 2d 426](#)
(Ct. App. 1997)

- Relationship of parent and child does not, by itself, establish a confidential relationship

Rahr v E Wis Tr Co
(*In re Est of Fechter*)
[88 Wis. 2d 199](#) (1979)

- When first factor coupled with suspicious circumstances and proven by clear, satisfactory, and convincing evidence, rebuttable presumption of undue influence raised

- Burden of proof then falls to proponents to rebut

Miller v Vorel
(*In re Est of Vorel*)
[105 Wis. 2d 112](#)
(Ct. App. 1981)

- Suspicious circumstances may include without limitation

- Beneficiary’s involvement in procurement of will
- Haste with which will prepared
- Misrepresentation about will’s contents by beneficiary
- Total omission of natural objects of testator’s bounty

- Beneficiary taking possession of original will after execution

Malnar v Stimac
(*In re Est of Malnar*)
[73 Wis. 2d 192](#) (1976)

- Beneficiary providing translation of testator's wishes to scrivener
- Beneficiary excluding family from information/contact with testator until after death

5) Presumptions and inferences regarding undue influence

Patterson v Jensen
(*Will of Faulks*)
[246 Wis. 319](#) (1945)

a. Burden on opponent to raise presumption to show sufficient facts to establish

- If 2-element test used

Sensenbrenner v
Sensenbrenner (In re
Est of Sensenbrenner)
[89 Wis. 2d 677](#) (1979)
Hover v Horan
(*Est of Barnes*)
[14 Wis. 2d 643](#) (1961)

— Confidential relationship and suspicious circumstances

Brehmer v Demien
(*Est of Brehmer*)
[41 Wis. 2d 349](#) (1969)

- If 4-element test used

— At least 3 of the 4 elements

— Fourth element may be inferred by Ct with slight additional evidence

Rahr v E Wis Tr Co
(*In re Est of Fechter*)
[88 Wis. 2d 199](#) (1979)

b. Burden is by clear and convincing standard

I. Settlement of will contests

[§_879.59](#)

1) Ct may approve written compromise between parties to resolve dispute

[§_879.59\(6\)](#)

- a. Ct must inquire into circumstances surrounding agreement terms

Street v Owens
(*Est of McKillip*)
[53 Wis. 2d 202](#) (1971)

- b. Statutory agreements not against public policy but merely recognize rights of parties to compromise

Kohls v Prasser
(*Est of Gutenkunst*)
[232 Wis. 81](#) (1939)

- 2) Ct should not approve settlement designed to totally defeat testator's purpose and ignore will

Trojan v Trojan
(*In re Est of Trojan*)
[53 Wis. 2d 293](#) (1972)

- 3) Compromise to include and be binding on all affected parties, including persons unknown or not in being at the time

[§ 879.59\(4\)](#)
Recommendation

- a. Ct should ensure that all potentially affected parties are represented

J. Costs and fees paid by estate

[§ 879.35](#)
[§ 879.37](#)
Trojan v Trojan
(*In re Est of Trojan*)
[79 Wis. 2d 3](#) (1977)
Bethesda Church v
Menning
(*In re Est of Christen*)
[72 Wis. 2d 8](#) (1976)
Bloom v Grawoig
(*In re Est of Becker*)
[2008 WI App 28](#), ¶ 10
[308 Wis. 2d 349](#)

- 1) Reasonable Atty fees and costs may be awarded out of estate as a whole, rather than out of a subset of the estate distributed to certain heirs, to prevailing party in contested matter and to unsuccessful proponent/contestant of will or other document if proponent/contestant named as personal representative in will/other document and propounded it in good faith as will of decedent

Wolf v Est of Wolf
(*In re Est of Wolf*)
[2009 WI App 183](#)
[322 Wis. 2d 674](#)

- 2) Generally Atty fees are not recoverable in a will contest when it is resolved by settlement

Troy v Johnson
(*In re Est of Hartshorne*)
[2017 WI App 59](#), ¶ 21
[378 Wis. 2d 75](#)

- 3) Atty fees may be awarded by the Ct in cases where the contesting party/objector achieves some significant benefit in litigating the claim

5. Will Construction

A. Jurisdiction

- 1) Vested in Probate Ct in Cty where testator domiciled

Will of Harker

[172 Wis. 99](#) (1920)

- a. If only ancillary proceeding, Wis Ct SHOULD NOT exercise jurisdiction to construe

St v Rudd

(Est of Rees)

[233 Wis. 635](#) (1940)

- b. But, if will disposes of Wis real estate, Wis Ct MAY exercise jurisdiction to construe

[§_805.05\(1\)](#)

Ixonia St Bank v

Schuelke

(In re Est of Martz)

[171 Wis. 2d 89](#)

(Ct. App. 1992)

- c. Can consolidate civil action into probate proceeding

B. Methods to seek construction

[§_863.21](#)

Lohr v Viney

(In re Est of Lohr)

[174 Wis. 2d 468](#)

(Ct. App. 1993)

- 1) Petition and notice in Probate Ct as separate proceeding or in conjunction with petition for final judgment

[§_806.04](#)

- 2) Declaratory judgment in civil Ct

C. Notice

[§_879.03](#)

- 1) Ct must order notice given under [§_879.05](#) to all parties with interests that may be affected

[§_863.21](#)

- 2) When construction requested in petition for final judgment, notice of hearing must include specific reasons for request

[§_854.10](#)

D. Choice of law

The meaning and legal effect of the will are determined under the law of the state selected by testator unless contrary to public policy of Wis

E. Hearing on petition for construction

Lohr v Viney
(*In re Est of Lohr*)
[174 Wis. 2d 468](#)
(Ct. App. 1993)

- 1) Ct must first find that ambiguity or inconsistency exists before proceeding with construction
- 2) Ambiguity exists when the will's language is subject to 2 or more reasonable interpretations, either on its face, or as applied to the surrounding circumstances to which it refers

a. Patent ambiguity is one that is evident on the face of the will

*Madison Gen Hosp Med
& Surgical Found v Volz*
(*In re Est of Ganzer*)
[79 Wis. 2d 180](#) (1977)

b. Latent ambiguity may exist when will on its face contains no ambiguities, but application of will when looking at surrounding circumstances creates ambiguity or inconsistency

- Ct may look to surrounding circumstances to determine whether a latent ambiguity exists

Gehl v Reingruber
(*Est of Gehl*)
[39 Wis. 2d 206](#) (1968)

- Generally, if no ambiguity exists after referring to surrounding circumstances, Ct not to allow extrinsic and parol evidence to be admitted for purpose of establishing ambiguity

Lohr v Viney
(*In re Est of Lohr*)
[174 Wis. 2d 468](#)
(Ct. App. 1993)

3) If ambiguity is established, primary goal of Ct in hearing process is to determine the intent of testator

a. Reference should be made to surrounding circumstances at time of will execution

b. If ambiguity still persists after considering surrounding circumstances, Ct may resort to extrinsic evidence

*Madison Gen Hosp Med
& Surgical Found v Volz*
(*In re Est of Ganzer*)
[79 Wis. 2d 180](#) (1977)

c. While some decisions have made reference to rule against admissibility of parol evidence, some parol evidence is frequently allowed to ascertain intent

§_905.03(4)(b)

- d. Testator's Atty may testify as an exception to Atty-client privilege if client communication is relevant to issue between the parties

F. Limitations on construction

Jorns v Roehrborn
(*In re Est of Hillman*)
[122 Wis. 2d 711](#)
(Ct. App. 1985)

- 1) Ct must find that ambiguity or inconsistency exists to proceed with construction. If no ambiguity or inconsistency, Ct must not construe

- a. Construction must not be used lightly just to cover oversight by drafter

Chamberlain v Waite
(*Will of Levy*)
[234 Wis. 31](#) (1940)

- 2) Construction not applicable until issue ripens. Ct will not construe issues that may arise in the future

Wilson v First Wis Tr Co (In re Tr of Pauly)
[71 Wis. 2d 306](#) (1976)
Bd of Trs v Farrow (Est of Berry)
[29 Wis. 2d 506](#) (1966)

- 3) Failure of will to provide complete disposition of estate because of subsequently occurring or unplanned events is not necessarily an ambiguity
- a. Lack of beneficiary because of death, disclaimer, nonexistence of an entity, or other event may simply result in lapse of bequest unless gift by implication or *cy pres* doctrine is appropriate based on intent of testator

Sattel v Brenner
(*Est of Zink*)
[15 Wis. 2d 527](#) (1962)
Petit v Petit (Will of Petit)
[246 Wis. 620](#) (1945)

- 4) Generally, construction does not allow Ct to reform or remake will even if will appears inequitable

Bank of Sturgeon Bay v Schoenbrunn
(*Est of Sneeberger*)
[54 Wis. 2d 657](#) (1972)

- 5) If no ambiguity exists, will may not be reformed even if evidence of mistake clear

G. Intent of testator

*Holy Family Convent v
Dept of Rev
(In re Est of Pierron)*
[157 Wis. 2d 192](#)
(Ct. App. 1990)

- 1) Entire will to be considered and to be construed as a whole

*Gehl v Reingruber
(Est of Gehl)*
[39 Wis. 2d 206](#) (1968)

- 2) Intention sought as existed at time of will execution and not what might have been considered by testator at a later time

*McElligott v Murray
(Est of Connelly)*
[65 Wis. 2d 440](#) (1974)

Doctrine of probable intent has not generally been accepted

*Thompson v Allaert
(In re Est of Haese)*
[80 Wis. 2d 285](#) (1977)
*Madison Gen Hosp Med
& Surgical Found v Volz
(In re Est of Ganser)*
[79 Wis. 2d 180](#) (1977)

- 3) Meaning of words to be viewed subjectively, seeking testator's view, which may or may not be the same as dictionary usage

*Baker v McBride
(Est of Liginger)*
[14 Wis. 2d 577](#) (1961)

- 4) Precatory words may become mandatory if they carry out what appears to be testator's intent

*MacLean v First Nat'l
Bank of Madison
(Est of MacLean)*
[47 Wis. 2d 396](#) (1970)

- 5) Ct may implement testator's intent by applying gift by implication doctrine

- a. Three requirements for gift by implication to apply

- Will has an omission that fails to cover the contingency that subsequently arose
- Ascertainment of the intention of the testator by looking at will in light of surrounding circumstances
- Clue to this intention is embedded in words of will

*Lohr v Viney
(In re Est of Lohr)*
[174 Wis. 2d 468](#), 486
(Ct. App. 1993)

- 6) Interpretation of provisions that are ambiguous or inconsistent with other provisions should be consistent with testator's intent without regard to ambiguous language

Rosenbaum v Bishop
Tr Co (Will of Friend)
[259 Wis. 501](#) (1951)

- 7) Precedent value slight; must look for intent of this specific testator

[§ 853.25](#)

H. Unintentional failure to provide for issue

- 1) If will fails to provide for child born or adopted after will executed, child entitled to share of estate unless
 - a. Evidence demonstrates failure was intentional, or
 - b. Decedent provided for child by transfer outside the will and evidence demonstrates transfer was intended in lieu of provision in will
- 2) If will fails to provide for child living at time will executed, child entitled to share only if clear and convincing evidence proves mistake or accident by testator unless
 - a. Evidence demonstrates failure was intentional, or
 - b. Decedent provided for child by transfer outside of will and evidence demonstrates transfer was intended in lieu of provision in will

I. Specific problems in will construction

- 1) Presumption of complete disposition

Hegner v Staudenmaier
(Est of Kugler)
[52 Wis. 2d 532](#) (1971)
Lohr v Viney
(In re Est of Lohr)
[174 Wis. 2d 468](#), 482
 (Ct. App. 1993)

- a. Presumption that testator meant all property to pass under will
 - Presumption strengthened by existence of residuary clause

Jorns v Roehrborn
(In re Est of Hillman)
[122 Wis. 2d 711](#)
 (Ct. App. 1985)

- b. Presumption does not apply if no ambiguity in will

Hegner v Staudenmaier
(Est of Kugler)
[52 Wis. 2d 532](#) (1971)

- c. Avoidance of partial intestacy encouraged

2) Description of property

*Smith v First Nat'l Bank
 & Tr Co*
(Will of Smith)
[235 Wis. 66](#) (1940)

- a. Presumption that testator intended to leave what testator thought he or she owned

Grochowski v Larson
(In re Est of Larson)
[196 Wis. 2d 231](#)
 (Ct. App. 1995)

- b. “Tangible personal property” provision held not to include bank accounts, certificates of deposit, annuity and trust proceeds, or cash on hand

3) Real property interests conveyed

[§ 853.29](#), [§ 853.31](#)
Woehler v Bohnert
(Will of Richter)
[215 Wis. 108](#) (1934)

Presumption of devise of entire interest in land conveyed unless opposite intent clear

[§ 853.33](#), [§ 854.11](#)
 46 ALR3d 7 (1972)

4) Gift of securities

- a. “Securities” defined in broadest terms
- b. Gift of stated number usually taken to be specific bequest
- c. [Sec. 854.11](#) does not apply if finding of contrary intent

5) Determining specific beneficiaries

[§ 851.03](#)

a. Definition of beneficiary

Gallagher v Gallagher
(*Est of Gallagher*)
[231 Wis. 621](#) (1938)

b. Need not be named, if reasonably ascertainable

Uilhein v Uilhein
[11 Wis. 2d 219](#) (1960)

6) Gifts to children

§_853.50

a. May mean grandchildren, stepchildren, nonmarital children, and remote descendants, BUT

Parsons v Parsons
(*In re Tr of Parsons*)
[56 Wis. 2d 613](#) (1973)
Thauer v Hughes
(*Est of Bohnsack*)
[20 Wis. 2d 448](#) (1963)
57 Marq L Rev 173
(1973)

b. Rebuttable presumption against including nonmarital children

c. But see §_852.05 for presumption in intestacy

7) Gifts to class

a. Groups of beneficiaries referred to as “my children” or “my cousins” may give rise to various questions

First Nat’l Bank v
Evenson
(*Est of Evans*)
[274 Wis. 459](#) (1957)
51 ALR3d 1250 (1973)

- Identification of class members

Latimer v Williams
(*Will of Latimer*)
[266 Wis. 158](#) (1954)
Williams v Parsons
(*Will of Griffiths*)
[172 Wis. 630](#) (1920)

- Time of vesting

Witte v Schuette
(Est of Scheffler)
[3 Wis. 2d 421](#) (1958)

- Method of share division—per capita or per stirpes

8) Charitable bequests

Bletsch v Barth
(Est of Bletsch)
[25 Wis. 2d 40](#) (1964)

- a. Charitable bequests favored in law if intended charity can be identified

§ 701.0413
Bd of Trs v Farrow
(Est of Berry)
[29 Wis. 2d 506](#) (1966)

- b. If bequest refused or charity not identifiable, *cy pres* doctrine may be applied

- *Cy pres* doctrine is common-law doctrine, now codified, employed when inability to identify charitable beneficiary in bequest

— To determine substitute beneficiary as nearly approaching testator's purpose as possible

Madison Gen Hosp Med
& Surgical Found v Volz
(In re Est of Ganzer)
[79 Wis. 2d 180](#) (1977)

- Used to distribute trust assets when purpose is no longer possible, practical, or lawful. See [PR 9](#) for discussion of trusts

§ 879.03(2)

- c. Must give notice to AG when probate proceedings affect certain charitable trust

Price v Ruggles
[244 Wis. 187](#) (1943)

9) Condition subsequent

Burrows v Madison Park
& Pleasure Drive Ass'n
[177 Wis. 639](#) (1922)

- a. Must be construed against one claiming a reversion

- b. To terminate estate, must show purpose willfully disregarded

10) Vesting

Brindley v Fowell
(Est of James)
[273 Wis. 50](#) (1956)
Wilson v Dixon
(Est of Wadleigh)
[250 Wis. 284](#) (1947)

- a. Law prefers vesting over contingency or postponement

Malcolm v First Nat'l
Bank & Tr Co
(Will of McDowell)
[31 Wis. 2d 519](#) (1966)
Egan v Heirs of Platten
(Est of Lawrence)
[22 Wis. 2d 624](#) (1964)

- b. Vesting issues may arise in determining testator's intent on postponement of possession or enjoyment

Malcolm v First Nat'l
Bank & Tr Co
(Will of McDowell)
[31 Wis. 2d 519](#) (1966)

- Postponement of time of use does not by itself prevent present vesting if there is a present absolute gift

Egan v Heirs of Platten
(Est of Lawrence)
[22 Wis. 2d 624](#) (1964)

- When use and enjoyment is contingent on an event in the future, vesting not effective until future event occurs

Murray v Kluck
[87 Wis. 566](#) (1894)

11) Life estate and right of disposition or consumption

- a. Unless will clearly expresses otherwise, tenancy for life does not allow tenant to convey or consume property

Schomberg v Gaenslen
(Will of Zweifel)
[194 Wis. 428](#) (1927)

- b. If will expressly or impliedly assumes consumption for personal pleasure, no limitation will be construed

- But broad language regarding consumption not construed to include disposition by will unless specifically provided

J. Conclusiveness of construction

Vruwink v Joling
(Est of Greeneway)
[236 Wis. 503](#) (1941)

1) Formal construction by Judge becomes res judicata (issue preclusion)

MacLean v First Nat'l
Bank of Madison
(Est of MacLean)
[47 Wis. 2d 396](#) (1970)

Exception exists when interested parties who are entitled to special notice of construction are not noticed

Heinemann v Rosier
(Est of Pardee)
[240 Wis. 19](#) (1942)

2) Construction relates back and is effective as of testator's death

Rehfuss v LaCrosse Tr Co
(Est of Rehfuss)
[65 Wis. 2d 409](#) (1974)
Falk v First Wis Tr Co
(Will of Falk)
[12 Wis. 2d 247](#) (1961)

3) All final judgments distributing testate estate are final constructions

MacLean v First Nat'l
Bank of Madison
(Est of MacLean)
[47 Wis. 2d 396](#) (1970)

Exception exists when interested parties who are entitled to special notice of construction not noticed

O'Neill v Buchanan
(In re Est of O'Neill)
[186 Wis. 2d 229](#)
 (Ct. App. 1994)

4) Party seeking relief from final order must move to reopen decision under [§_879.31](#) and [§_806.07](#)

Ct not to entertain motion for reconsideration

[§_879.27](#)

5) Appeal

Williams v Parsons
(Will of Griffiths)
[172 Wis. 630](#) (1920)

a. Personal representative, on behalf of estate, or any interested party may appeal order construing will

Will of Brandstedter
[198 Wis. 457](#) (1929)

b. All interested parties having notice bound by Ct decision subject to appeal

Carpenter v First Nat'l
Bank & Tr Co
(Will of Asby)
[232 Wis. 481](#) (1939)

Stratton v Rollings
(Est of Phillips)
[236 Wis. 268](#) (1940)

- c. If appeal in good faith and questions worthy, review costs may be paid out of estate even if appeal unsuccessful, but generally Ct reluctant to allow costs from estate

6. Exoneration, Abatement, Ademption, and Lapse of Bequests

A. Exoneration of liens on property bequeathed to beneficiary

Budd v Hansen
(Est of Budd)
[11 Wis. 2d 248](#) (1960)

- 1) Under common-law rule, beneficiaries were entitled to take property free of liens and encumbrances

[§ 863.13](#)

[§ 854.05](#)

- 2) Statutes reverse common law so property received by beneficiaries will be assigned subject to liens at time of death

- a. Exception applies if will, expressly or as construed from extrinsic evidence, provides to the contrary
- b. If debt on encumbered property paid from other assets, transferee entitled to property only if transferee contributes to pay debt or payer is paid by new encumbrance of property
- c. Rule also applies to joint property or life insurance that is encumbered
- d. If debt is paid from estate as a result of claim, estate subrogated to rights of claimant

Schinker v McCraw
(In re Est of Karrels)
[148 Wis. 2d 448](#)
 (Ct. App. 1988)

- 3) Beneficiary takes subject to year-of-death real estate taxes with no right of prorated reimbursement from estate; burden of taxes deemed to be imposed at time of assessment or levy

B. Abatement when assets are insufficient to satisfy will provisions

1) Will may have provisions that determine order of abatement

§_863.11

§_854.18

2) After payments of claims and allowances under §_859.25(1) (and taking into account the share of a spouse under §_861.02 and §_853.12 and the share of a child taking under §_853.25), bequest and shares of distribution abate in the following order

a. Property not disposed of by will

b. Residuary bequests

c. General bequests

d. Specific bequests

Naumann v Toft

(Est of Haberli)

[41 Wis. 2d 64](#) (1968)

- Bequest of a sum of cash is a general and not a specific bequest

3) No preference or priority based on nature of assets, real estate vs. personal property

§_863.11

§_854.18(3)

4) Ct may abate distribution in another manner if found necessary to effect testator's intent

C. Ademption by extinction

Atkinson v Atkinson

(Est of Atkinson)

[19 Wis. 2d 272](#) (1963)

1) Under common-law rule, if subject matter of a specific bequest was no longer owned at time of death, bequest could not be given any effect

§_853.35

§_854.08

Anderson v Anderson

(In re Est of Anderson)

[147 Wis. 2d 83](#)

(Ct. App. 1988)

- 2) There are certain statutory exceptions to ademption by extinction resulting in nonademption
 - a. When specifically bequeathed property is subject to any casualty within one year before testator's death, which is compensable by insurance, beneficiary may have right to insurance proceeds
 - b. When specifically bequeathed property is sold by decedent within two years before testator's death, beneficiary is entitled to unpaid balance on purchase price at time of death and legacy equal to amount of purchase price paid to testator within one year before death
 - c. When specifically bequeathed property is taken by condemnation, beneficiary is entitled to unpaid balance due at time of death and any amount paid testator within one year before death
 - d. When specifically bequeathed property is sold or mortgaged by guardian, conservator, or agent under a DPA, beneficiary is entitled to net amount of proceeds

D. Ademption by satisfaction/Advancements during lifetime

First Wis Tr Co v

Chakouras

(Will of Cramer)

[183 Wis. 525](#) (1924)

- 1) Under common-law rule, if after making will giving a legacy to a child, testator made a gift to the child of the sum mentioned or a portion of that sum, gift was presumed to be in ademption or satisfaction of will provision

§ 854.09

§ 853.19

Anderson v Anderson

(Est of Anderson)

[147 Wis. 2d 83](#)

(Ct. App. 1988)

- 2) Statute reverses and eliminates common-law rule of ademption by satisfaction except in the following situations
 - a. Will of testator provides for the deduction of the gift
 - b. Or, testator clearly states in writing that the gift is an advance of will bequest

- c. Or, beneficiary states in writing that the gift was an advance
- d. Extrinsic evidence admissible for above determinations

[§_854.06\(4\)](#)

E. Lapsing of bequests

Mangel v Strong

(*Est of Mangel*)

[51 Wis. 2d 55](#) (1971)

- 1) When a beneficiary predeceases the decedent, Ct to first determine from language in will whether a different disposition as provided in will should apply
 - a. Extrinsic evidence may be used to construe intent of testator

[§_853.27](#)

[§_854.06](#)

- 2) If no different disposition is to be applied, and if predeceased beneficiary is a grandparent of decedent, or issue of grandparent, or stepchild of decedent who left issue, such issue take the bequest per stirpes

Uihlein v Uihlein

(*Will of Uihlein*)

[264 Wis. 362](#) (1953)

- 3) If no different disposition is to be applied and beneficiary is not a grandparent of decedent, or issue of grandparent, or stepchild of decedent, the bequest shall lapse

[§_854.07](#)

- a. A nonresidual bequest will become part of the residue

[§_854.07](#)

- b. If bequest is part of residue and there are 2 or more residual beneficiaries, failed bequest passes to other residual beneficiaries proportionately

7. Standard of Review

Velk v Lewandowski

(*Est of Velk*)

[53 Wis. 2d 500](#) (1972)

A. Standard of review on appeal

- 1) Findings of Trial Ct sustained unless against great weight and preponderance of evidence

Lohr v Viney
(In re Est of Lohr)
[174 Wis. 2d 468](#)
 (Ct. App. 1993)

- 2) Evidence of discretion sustained if record shows Trial Ct applied correct legal standard to facts and reached reasoned conclusions

8. Right to Disclaim

§_854.13

- A. Any person to whom property would otherwise pass may disclaim any or all property as provided under §_854.13**

§_854.13(3)

B. Instrument of disclaimer shall

- 1) Describe property disclaimed
- 2) Declare disclaimer and extent of disclaimer
- 3) Be signed by disclaimant
- 4) Be executed and delivered to personal representative or special administrator not later than 9 months after death of deceased transferor

§_854.13(12)(b)

- C. Disclaimer effective if meets requirements of [IRC](#) § 2518 or any other federal law relating to disclaimer**

D. Disclaimer by guardian, conservator, trustee, or agent under power of Atty (PA)

§_854.13(2)(f)
 §_54.20(2)

- 1) Guardian of estate or conservator may disclaim with Ct approval

§_854.13(2)(g)

2) Agent under power of Atty (PA) may disclaim if

- a. Person who granted PA is entitled to disclaim
- b. And, PA specifically grants such power

[§ 854.13\(2\)\(gm\)](#)

3) Trustee of a trust named as a beneficiary under a will may disclaim on behalf of the trust

- a. If trust authorizes disclaimer by trustee, or
- b. With Ct approval if trust does not authorize disclaimer

[§ 854.13\(4\)](#)

Spatt v Balson

(Est of Balson)

[183 Wis. 2d 31](#)

(Ct. App. 1994)

E. Time for disclaimer

- 1) Instrument disclaiming present interest executed and delivered within 9 months after decedent's death unless extended by Ct
- 2) Instrument disclaiming future right to receive discretionary or mandatory distributions of income or principal from any source may be executed at any time
- 3) Instrument disclaiming future interest executed and delivered within 9 months after event that determines taker of property
- 4) Person under 21 may disclaim at any time not later than 9 months after 21st birthday
- 5) Person whose interest arises from disclaimer or default may disclaim within 9 months after

- a. Date disclaimer instrument delivered, or
- b. Date of death of donee of the power

§_854.13(2)(h)

- 6) Person's right to disclaim may be exercised by person's personal representative or special administrator after person's death if approved by Ct having jurisdiction of person's estate
 - a. Personal representative or special administrator must not have taken any action that would bar right to disclaim under §_854.13(11g)
 - b. Notice given by personal representative or special administrator to all interested persons before hearing on application

§_700.17(2)(a)

§_854.13(2)(b), (8)

- 7) A surviving joint tenant may disclaim any interest in property that would have accrued to such survivor by right of survivorship

Any such disclaimed interest shall become an asset of the decedent's estate

§_854.13(5)(c)

F. Copy of instrument of disclaimer filed in Probate Ct having jurisdiction

§_854.13(5)(d)

Failure to file copy with Ct within specified time does not affect validity of disclaimer

G. Effect of disclaimer

§_854.13(6)

- 1) Property or interest disclaimed considered not to have been vested in, created in, or transferred to disclaimant

§_854.13(7)(a)

- 2) Subject to §_854.13(7)(bm), (c), (8), (9), and (10), unless the governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, property or interest disclaimed devolves as if disclaimant predeceased decedent

§_854.13(11g)

H. Right to disclaim property or interest barred by

- 1) Assignment, conveyance, encumbrance, pledge, or transfer of property or interest or contract therefor
- 3) Written waiver of right to disclaim
- 4) Acceptance of property, interest, or benefit of property

PR 3: POWERS AND DUTIES OF PERSONAL REPRESENTATIVE (FORMAL PROBATE)

[§ 857.01](#)

1. Personal Representative Succeeds to Interest of Decedent

Lloyd v Lloyd
(In re Est of Lloyd)
[170 Wis. 2d 240](#)
 (Ct. App. 1992)

A. Personal representative or surviving spouse may petition Ct

- 1) For order to determine classification of property under [Ch 766](#) and
- 2) For other equitable relief necessary for management and control of marital property during estate administration

B. During administration of estate, Ct may make any decree under [Ch 766](#) to assist personal representative or surviving spouse in management and control of

- 1) Marital property
- 2) Decedent's property classified as other than marital property

C. During administration, management and control rules under [§ 766.51](#) apply to surviving spouse's property and to decedent spouse's property subject to administration

While property is subject to administration, personal representative may manage and control property subject to election of surviving spouse under §_861.02

D. Personal representative to determine when, during administration, property elected by spouse under §_861.02 distributed

§_857.03

2. Specific Powers and Duties

A. Personal representative has power

§_860.01

- 1) Of sale, mortgage, lease without Ct approval

§_857.25

- 2) To continue business

§_857.27

- 3) To form corporation or LLC

§_857.29

- 4) To plat land

§_895.04(1)

- 5) To commence and maintain legal proceedings, including wrongful death actions

- 6) To obtain and disclose decedent's digital property as provided for in §_711.05

B. Personal representative has duty to

§_863.23

DiBenedetto v Jaskolski

(In re Est of Thompson)

[2003 WI App 70](#)

[261 Wis. 2d 723](#)

- 1) Determine names, ages, residence, and degree of relationship of all possible heirs

Old Rep Sur Co v Erlien

(In re Est of Erlien)

[190 Wis. 2d 400](#)

(Ct. App. 1994)

- 2) Collect, inventory, possess, manage, and insure assets

Ixonia St Bank v

Schuelke

(In re Est of Martz)

[171 Wis. 2d 89](#)

(Ct. App. 1992)

a. But may not raid joint account when right of survivorship

§_860.13
Piette v Horn
(In re Est of Stevens)
[2015 WI App 41](#), ¶ 11
[362 Wis. 2d 484](#)

b. Personal representative must not be purchaser, mortgagee, or lessee of estate property except under specific circumstances

§_858.01, §_862.01 §_862.17

3) File inventory and accounts

§_766.31(3)(b)3.
 §_857.03(2m)

4) Exchange interests with surviving spouse

§_857.03(1)

5) Review and pay claims

Hegner v
Van Rossum Est
(In re Est of Kugler)
[117 Wis. 2d 314](#) (1984)

6) Preserve and invest assets

§_863.19

7) Value and distribute assets

§_857.35

8) Notify spouse

§_71.13, 72.30(3)

9) File state and federal income and estate tax returns unless waived

C. Personal representative who is not surviving spouse

§_857.35

1) If personal representative not surviving spouse becomes aware that any beneficiary other than surviving spouse designated to receive more than 50% of proceeds of any life insurance policy or deferred employment benefit plan

a. Must give spouse written information sufficient to identify policy or plan and any beneficiary

- Spouse may have claim under §_766.70(6)

§_54.66(1)

D. Personal representative or special administrator duty if decedent was guardian of an estate

Personal representative of estate of person who was guardian of an estate for another person shall render final guardianship account to Ct and to successor guardian

3. Inventory

§_858.01

A. Filing requirements

- 1) Personal representative must file inventory of all property of decedent within reasonable time

Not to exceed 6 months after appointment unless Ct order extended or shortened time

- 2) Inventory, when filed, must show, as of date of decedent's death,

- a. Value of all decedent's property

- b. Property that is marital property as defined in §_766.31

- See [PR 4, Sec. 1](#), for marital property discussion

- c. Type and amount of any existing obligation relating to any item of property

- 3) No personal representative subsequently appointed need file further inventory unless Ct orders or additional property found

§_858.05

B. Order to file inventory

- 1) If personal representative neglects to file inventory when required, Ct must call neglect to personal representative's attention
- 2) If personal representative still neglects to file, Ct must issue order to file inventory

Personal representative may be held in contempt of Ct if, without showing reasonable cause, refuses or neglects to comply with order for 20 days after service

§_858.07, §_858.09

C. Contents of inventory

- 1) Personal representative must include all property subject to administration and must include statement of any encumbrances, liens, or other charges and certify that, to best of personal representative's knowledge, it is comprehensive

[§_851.27](#)

- 2) Property subject to administration means any interest, legal or equitable, in real or personal property, without distinction as to kind, including money, rights of a beneficiary under a contractual arrangement, choses in action, digital property as defined in [§_711.03\(10\)](#), and anything else that may be the subject of ownership. It **does not include**:

- a. Decedent's interest in jointly owned property and survivorship marital property
- b. Decedent's interest in property payable on death
- c. Decedent's interest in a life estate
- d. Life insurance and annuity payments payable to named beneficiaries other than the estate

Meegan v Netzer

(*In re Est of Hansen*)

[2012 WI App 20](#), ¶ 10

[339 Wis. 2d 460](#)

- e. Gift *causa mortis*, i.e., in contemplation of death, if (1) decedent had intention to make gift effective at death; (2) decedent made gift with a view to decedent's death from present illness or from external and apprehended peril; (3) decedent died from that ailment or peril; and (4) there was delivery of the gift. If all requirements are met, gift is not included in inventory

Est of Oaks v Stouff

(*In re Est of Oaks*)

[2020 WI App 29](#)

[392 Wis. 2d 352](#)

Note: In this case, the Wis Court of Appeals found that the requirements of the doctrine of gift *causa mortis* were met and the use of summary judgment was appropriate.

[§_705.04\(1\)](#)

- f. Joint accounts with right of survivorship

Henke v Est of Klawitter

(*In re Est of Klawitter*)

[2023 WI App 60](#)

[409 Wis. 2d 696](#)

Note: In the *Klawitter* case, the Appellate Ct upheld the Circuit Ct's findings that the decedent intended to create accounts of convenience with no right of survivorship for the joint owner. The Circuit Ct had determined that the estate rebutted the presumption in [§_705.04\(1\)](#) (that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party") by presenting "clear and convincing evidence" that the decedent had "a different intention at the time the account[s] [were] created."

- 3) Ct, at request of any person interested in estate or listed property, or on own motion, may examine personal representative under oath in relation to any item in inventory or as to any proposed addition or deletion to inventory

D. Appraisal

§_858.13, §_858.15

All inventoried property shall be appraised by 1 or more disinterested persons appointed by Ct unless value of asset readily ascertainable

If property situated in 2 or more counties, 1 or more appraisers may be appointed for each Cty

E. Contested matters

Templeton v Moccero

(*In re Est of Moccero*)

[168 Wis. 2d 313](#), 321

(Ct. App. 1992)

- 1) Once objection to inventory filed, Ct may limit time for filing all objections, thus barring claim by party interested that property subject to administration was omitted from inventory

Ruediger v Sheedy

(*In re Est of Ruediger*)

[83 Wis. 2d 109](#), 123

(1978)

- 2) An objection is an appropriate way to challenge an inclusion in or an omission from the inventory

§_879.63

- 3) Interested person may bring action to recover omitted property if personal representative has not done so

Bell v Neugart (In re

Est of Christopherson)

[2002 WI App 180](#)

[256 Wis. 2d 969](#)

Prevailing objector may seek reasonable expenses and Atty fees incurred in doing so at discretion of Ct

Neuser v Danz

(*In re Est of Corey*)

[73 Wis. 2d 644](#) (1976)

- 4) When property not in decedent's possession, burden of proof that decedent owned the property is on the estate

Neuser v Danz

(*In re Est of Corey*)

[73 Wis. 2d 644](#) (1976)

- 5) Civil Cts may have concurrent jurisdiction in contested matters

§_862.01

4. Accounts

- A. Except when final settlement by sworn statement under [§_865.16](#), every personal representative must file in Ct a verified account of administration

- 1) When petition for final settlement filed
- 2) Upon revocation of letters
- 3) When application to resign submitted
- 4) At any other time when directed by Ct either on own motion or on application of any person interested

§_862.17

B. If fails to account, Ct may proceed to remove under §_857.09

§_862.07

C. Account to be for all property of decedent in personal representative's possession, all profits and income from estate, gains and losses from property sold, and all payments, charges, and losses

§§_701.1101–.1136

Must use Principal and Income Act unless will specifically directs otherwise

§_862.03

D. Accounts of incompetent, deceased, or removed personal representatives

- 1) If personal representative adjudicated incompetent, account filed by personal representative's guardian
 - a. Personal representative's bonding company to file account if guardian fails to
 - b. If neither guardian nor bonding company files, Ct to appoint special administrator to file account
- 2) If personal representative dies, account filed by personal representative of deceased personal representative's estate

If personal representative of estate fails to file, account filed by special administrator of estate or by bonding company

- 3) If personal representative removed and fails to file account, account filed by personal representative's bonding company

If bonding company fails to file, Ct to appoint special administrator to file account

[Ch 877](#) (actions by and against personal representatives)

5. Liability of Personal Representative

Nelson v Onstad
(*Est of Onstad*)
[224 Wis. 332](#) (1937)

- A. General rule—personal representatives who proceed under terms of will protected if they act prudently, but if losses are sustained through their negligence, misconduct, or if statutes hold them responsible, they are personally liable for resulting losses**

B. Specific instances when personal liability may attach

Henneman v Robinson
(*Will of Robinson*)
[218 Wis. 596](#) (1935)

- 1) Delay—Waste occasioned by delay in closing estate especially when accounts are not timely filed (e.g., failure to pay claims)

§ 881.01
Hegner v
Van Rossum Est
(*In re Est of Kugler*)
[117 Wis. 2d 314](#) (1984)

- 2) Investments—Failure to invest estate assets prudently

Wis Tr Co v Cousins
[172 Wis. 486](#) (1920)

- 3) Claim/Cause of Action—Failure to prosecute claim in favor of estate

NW Loan & Tr Co v
Turnock
(*Est of Turnock*)
[238 Wis. 438](#) (1941)
Est of Mohr
[212 Wis. 198](#) (1933)

- 4) Disbursement/Distribution—Settlement of claims or distribution to heirs if done in bad faith

Watkins v Zwietusch
[47 Wis. 513](#) (1879)
Will of Gehring
[179 Wis. 589](#) (1923)

- 5) Misconduct—Conversion of or secret/fraudulent dealing with estate property, at least to the extent of profit

- a. This may extend to agent's misconduct

Laatsch v Derzon
(*In re Est of Derzon*)
[2018 WI App 10](#)
[380 Wis. 2d 108](#)

- b. Misconduct includes extreme bad faith

Cf. St v Better Brite
Plating, Inc
[168 Wis. 2d 363](#) (1992)

6) Environmental Laws—Potential liability

§_71.17(3)

51 Marq L Rev 452

7) Taxes

§_857.31

C. Immunity—personal representative has no duty to give notice to potential claimants of date their claims must be filed; no duty to warn distributees of potential claims

§_857.15

6. Resignation or Removal

A. Resignation

Judge may accept written resignation of personal representative

§_857.15

B. Removal

1) Ct must remove personal representative

- a. If personal representative is adjudicated incompetent, disqualified, unsuitable, incapable of discharging duties, or
- b. If personal representative is nonresident who has not appointed resident to accept service of process

2) Ct may remove personal representative

- a. If personal representative fails to perform duty imposed by law or Ct order, or
- b. If personal representative ceases to be resident of Wis

Note: When grounds for removal appear to exist, Ct must order personal representative to appear and show cause why personal representative should not be removed.

§_857.09

C. Removal procedure

- 1) If personal representative fails to perform act or file document within time required by statute or Ct order, Ct may, on own motion or motion of interested person, order personal representative to show cause why act has not been performed or document filed

§_857.10

- a. Prima facie evidence of neglect of duty for personal representative to fail to inform persons interested or their representative

§_858.03

- Within 5 days after filing of estate's inventory if requested

§_859.29

- Within 5 days after filing claims against estate if requested

§_862.11

- Of filing final account

McDonald v McDonald

[53 Wis. 2d 371](#) (1972)

Holzhauser v Zartner

(*Will of Zartner*)

[183 Wis. 506](#) (1924)

- b. Mere delay in closing estate not sufficient grounds for removal if delay unavoidable

§_857.09

- c. Ct must mail copy of order to sureties of personal representative's bond

§_857.09

- 2) If cause not shown, Ct must determine whether personal representative or Atty at fault

- a. If both personal representative and Atty at fault, Ct may dismiss both

- Ct will appoint new personal representative and Atty acceptable to new personal representative

- b. If personal representative at fault, may be summarily dismissed and Ct must then appoint another to close estate

- c. If Atty at fault, Ct may dismiss and instruct personal representative to employ other Atty

- If personal representative fails to comply within 30 days, Ct must appoint Atty

Recommendation

- d. If removing Atty or personal representative, Ct should require prompt billing for fees and notice to interested parties and hold hearing if required

3) Procedure set forth in §_857.09 not exclusive method of removal

- a. Procedure discretionary if

§_862.17

- Personal representative fails to file account on day certain

- b. Procedure mandatory if

§_863.35(1)

- Dormant estate exists for more than 18 months and no Ct-authorized extension
- Estate open beyond Ct-authorized extension

§_857.13

D. Powers of surviving personal representative

All power exercised by co-personal representatives may be exercised by survivor(s) unless power given in will and its terms provide otherwise

PR 4: FAMILY RIGHTS

CAUTIONARY NOTE:

The Probate Code was revised by 1997 Wis. Act 188 and is effective for all those who died after 1/1/99 and for those whose rights were established by **irrevocable** governing instruments executed after 1/1/99.

1. Marital Property and Classification

A. Ownership of marital property at death

§_861.01(1)

1) Surviving spouse retains undivided 1/2 interest in each item of marital property

a. Surviving spouse's interest in marital property not subject to administration

b. Ownership and management and control rights set forth under [§_857.01](#) and [§_857.015](#)

- Either personal representative or surviving spouse may petition Ct for order determining classification of property under [Ch 766](#)

[§_861.01\(2\)](#)

2) Third-party successor in interest to any portion of decedent's 50% interest in marital property is tenant in common with surviving spouse

[§_861.01\(3m\)](#)

[§_766.31\(7m\)](#)

3) If marital property includes damages for loss of future income arising from personal injury claim of surviving spouse, surviving spouse entitled to receive as individual property that portion of award representing income substitute after death of other spouse

[§_766.31\(1\)](#)

Lloyd v Lloyd

(*In re Est of Lloyd*)

[170 Wis. 2d 240](#)

CA 1992)

B. Classification

1) All property presumed marital unless classified otherwise by [Ch 766](#). *See also* [PR 8](#)

a. Presumption may be rebutted by showing that time, method, or source of acquisition establishes it as nonmarital property

b. Challenger to marital property classification bears burden of rebutting presumption by tracing to nonmarital source

c. Presumption overcome when residence titled in decedent's name acquired before marriage and spouses' determination date

Lloyd v Lloyd

(*In re Est of Lloyd*)

[170 Wis. 2d 240](#), 270

(Ct. App. 1992)

- 2) Joint accounts with spouse created during marriage remain marital property regardless of subsequent action by decedent to place accounts in own name or joint tenancy with another

Cf. Templeton v Moccero

(*In re Est of Moccero*)

[168 Wis. 2d 313](#)

(Ct. App. 1992)

- 3) Transfer of separately owned property into joint tenancy changes character of ownership interest in entire property into marital

Nonmarital property must retain both character and identity to preserve exempt status

- 4) While placing separate property into joint tenancy with spouse converts entire amount into marital property, opposite NOT true

New or renewed accounts funded with marital property remain marital regardless of change in title

- 5) Interest and unexplained additions to nonmarital bank accounts between determination date and death of spouse are marital property

C. Methods of reclassifying property from nonmarital to marital

[§_766.31\(10\)](#)

- 1) Voluntary—A spouse may voluntarily reclassify that spouse's nonmarital property as marital property by, for example, gift, conveyance, or marital property agreement

[§_766.63\(1\)](#)

- 2) Mixing—Mixing marital property with nonmarital property reclassifies nonmarital property as marital except
 - a. As provided otherwise in [§_766.61](#), [§_766.62](#), and [§_766.625\(2\)](#)
 - b. When nonmarital component of mixed property can be traced

Lloyd v Lloyd

(*In re Est of Lloyd*)

[170 Wis. 2d 240](#)

(Ct. App. 1992)

- Tracing pertains to the identity of the property, not its character. “Identity” addresses whether the nonmarital asset has been preserved in some present identifiable form so that it can be meaningfully valued and assigned

c. When the contribution of marital property constitutes routine, normal, and usual maintenance

Krueger v Rodenberg

[190 Wis. 2d 367](#)

(Ct. App. 1994)

- Payment of taxes is routine, normal, and usual maintenance

Bille v Zuraff

(*In re Est of Bille*)

[198 Wis. 2d 867](#), 880

(Ct. App. 1995)

d. Component that can be traced retains its nonmarital character

Kobylski v Hellstern

(*In re Est of Kobylski*)

[178 Wis. 2d 158](#)

(Ct. App. 1993)

3) Industry mixing—Mixing industry with nonmarital property does not reclassify nonmarital property as marital, but it creates marital property. The challenger must satisfy 3 elements of industry mixing

a. Spouse applied substantial industry to the nonmarital asset

[§_766.63\(2\)](#)

- “Substantial industry” is a spouse’s contribution of substantial labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity to the nonmarital property
- Routine, normal, and usual maintenance of the property is not considered substantial industry

[§_766.63\(2\)](#)

b. Spouse received no reasonable compensation for the industry

c. Industry has produced a substantial appreciation of the nonmarital asset

Bille v Zuraff

(*In re Est of Bille*)

[198 Wis. 2d 867](#), 885–86
(Ct. App. 1995)

Note: Marital estate may be entitled to reimbursement in amount of value enhancement of, not expenditure on, nonmarital property.

Brandt v Brandt
[145 Wis. 2d 394](#), 407
(Ct. App. 1988)

4) Burden of proof

Absent allegations of fraud, gross negligence, or criminal acts, challenger has ordinary burden of proof—proof to a reasonable certainty by the greater weight of the credible evidence

2. Deferred/Augmented Marital Property and Property Transferred in Fraud of Surviving Spouse

Governed by §§ 851.055, 861.02, 861.03, 861.04, 861.05, 861.06, and 861.17

3. Other Rights, Allowances, and Exemptions

A. Assignment of home to surviving spouse

§ 852.09, § 861.21

See section on Assignment of **Home to Surviving Spouse or Surviving Domestic Partner** in [PR 5, Sec. 4](#), for discussion

§ 861.20

B. Surviving spouse's interest in nondomiciliary decedent's real property in Wis

§ 861.20(1)

- 1) Surviving spouse has same right to elect to take portion of nondomiciliary decedent spouse's real property located in Wis against decedent's will as if property located in decedent's domicile at time of death

§ 861.20(2)

- 2) Surviving spouse has same right to take nondomiciliary decedent spouse's real property located in Wis subject to administration under intestate succession as if property located in decedent's domicile at time of death

§ 861.31(1m)

C. Allowance to family during administration

- 1) Ct may, with or without notice, order payment of allowance necessary or appropriate for support of surviving spouse or surviving domestic partner and minor children

§_861.31(1m)

- a. Ct must consider size of probate estate, other resources available for support, existing standard of living, and other relevant factors

§_861.31(2)

- b. Allowance may be made separately to spouse or surviving partner and minor children or their guardian as Ct deems advisable

§_861.31(3)

- 2) Initial order for support may not exceed 1 year, but may be extended for additional periods of not more than 1 year at a time

Subject to revision or termination at any time by Ct order

§_861.31(4)

- 3) Ct may order allowance to be charged against income or principal

Ct may not charge allowance for minor children against surviving spouse's or domestic partner's interest

§_861.31(4)

- 4) Ct may order that allowance for support of surviving spouse or surviving domestic partner be applied in satisfaction of right to elect under §_861.02 or that allowance for support of surviving spouse be applied in satisfaction of entitlement under §_853.12

§_861.33

D. Selection of personalty by surviving spouse or surviving domestic partner

§_861.33(1)

- 1) Surviving spouse or surviving domestic partner may file written selection of personal property
 - a. Filed with Ct

- b. Property transferred to surviving spouse or surviving domestic partner by personal representative

§_861.33(1)(a)

2) Personal property includes

- a. Wearing apparel and jewelry held for personal use by decedent or surviving spouse or surviving domestic partner

- b. Automobile

- c. Household furniture, furnishings, and appliances

§_861.33(1)(a)

- d. Other tangible property not used in business and not exceeding \$3,000

§_861.33(3)

- e. Surviving spouse may select other unbequeathed items of tangible property that exceed \$3,000 by paying excess value to personal representative

§_861.33(1)(b)

- 3) Surviving spouse or surviving domestic partner may not select specifically bequeathed items, except normal household furniture, furnishings, and appliances necessary to maintain home

§_861.33(2)

- 4) Ct may limit transfer to \$5,000 in aggregate value if it appears claims against estate will not be paid in full

Spouse may pay excess value

§_861.33(4)

- 5) Personal representative has authority, without Ct order, to execute document effecting transfer of property selected by spouse

§_861.35

E. Special allowance for support of spouse or domestic partner and support and education of minor children

- 1) Ct may order allowance for support and education of each minor child until the child reaches specified age, not over 18, and for support of spouse or domestic partner

[§_861.35\(1m\)](#)

- a. May be made whether estate is testate or intestate
- b. If no surviving spouse or surviving domestic partner, in addition to allowance, Ct may transfer to any minor child household furniture, furnishings, and appliances

Caldwell v Caldwell[5 Wis. 2d 146](#), 163 (1958)

- c. “[T]he Ct may, in a proper case, require the father or his estate to provide for the support of a minor child after the father’s death if that should occur while such support is otherwise in order”
- d. No allowance may be made
 - If surviving spouse or surviving domestic partner and child have been amply provided for through probate and nonprobate assets
 - If other means available
 - In case of minor child, if spouse or surviving domestic partner is legally responsible for child’s support and education and has ample means to meet those needs, or
 - If surviving spouse or surviving domestic partner has ample means to meet own needs
- e. In making allowances, Ct must consider all the following

[§_861.35\(3\)](#)

- Ct shall balance the need for support of the surviving spouse or the surviving domestic partner or minor child’s needs for support against creditors’ interests under [§_859.25](#)
- Size of estate

- Other resources available for support
- Whether a marital property agreement will create hardship for spouse
- Existing standard of living
- Any other relevant factors

§_861.35(4)

- f. Ct may order allowance for spouse or surviving domestic partner to be applied in satisfaction of any entitlement under §_853.12 or any right to elect under §_861.02(1)

§_861.35(2)

- 2) Ct may set aside property in order to provide allowance and appoint trustee to administer, subject to continuing jurisdiction of Ct

§_861.41(1)

F. Exemption of property to be assigned to surviving spouse or surviving domestic partner

- 1) Surviving spouse or surviving domestic partner may petition Ct to exempt from creditors' claim an amount (not to exceed \$10,000) reasonably necessary for spouse's or domestic partner's support

Petition may only be made if assets insufficient to pay all claims and allowances and still leave spouse or surviving domestic partner with amount reasonably necessary for support in addition to selection and allowances

§_861.41(2)

- 2) Ct shall grant petition if assignment ahead of creditors is reasonably necessary for support of spouse

In making determination, Ct must take into account other resources, including a home, available to spouse or surviving domestic partner

PR 5: INTESTATE SUCCESSION

CAUTIONARY NOTE:

The Probate Code was revised by 1997 Wis. Act 188 and is effective for all those who died after 1/1/99 and for those whose rights were established by **irrevocable** governing instruments executed after 1/1/99.

§ 852.01

1. Basic Rules

A. Net estate of decedent not disposed of by will passes to surviving heirs in following order

1) To the spouse or domestic partner

§ 852.01(1)(a)1.

- a. Entire estate if no surviving issue of decedent or if surviving issue are all issue of surviving spouse or surviving domestic partner and decedent

§ 852.01(1)(a)2.

- b. If there are surviving issue who are not issue of surviving spouse or surviving domestic partner

- One-half decedent's property other than marital property and other than decedent's interest in property held equally and exclusively with surviving spouse or domestic partner as tenants in common

Carroll v Ansley
(*In re Est of Carroll*)
[2001 WI App 120](#)
[244 Wis. 2d 280](#)

- Since 1/2 marital property passes to surviving spouse outside of estate, deceased's interest in the marital property passes to the children of the deceased

§ 852.01(1)(b)

2) To the issue, per stirpes

- a. That share of estate not passing to spouse or surviving domestic partner
- b. Entire estate if no surviving spouse or surviving domestic partner

- If issue are same degree of kinship, they take equally
- If issue are of unequal degree of kinship, those of more remote degree take per stirpes

§_852.01(1)(c)

3) To the parents

§_852.01(1)(d)

4) To the brothers and sisters

To the issue of any deceased brother or sister per stirpes

§_852.01(1)(f)

5) To the grandparents and their issue as follows

- 1/2 to maternal grandparents equally if both survive or to surviving maternal grandparent or if both deceased, to the issue of the maternal grandparents per stirpes
- 1/2 to paternal grandparents as above

§_852.03(1)

6) When distribution is “per stirpes,” see §_854.04

§_852.03(5)

7) When person is related through 2 lines of relationship, see §_854.21(6)

§_852.03(6)

8) Person who takes through or by an alien (non-US citizen) is not disqualified

§_854.20, §_851.50

B. Status of adopted persons

1) Legally adopted person treated as biological child of decedent for purposes of intestate succession

2) Legally adopted person ceases to be child of biological parents except

- a. If biological parent remarries and child is adopted by stepparent, child is treated as child of biological parent
- b. If biological parent of marital child dies and other biological parent remarries and child is adopted by stepparent, for intestate determination regarding deceased parent's relatives, child continues to be treated as child of biological parent

Winiarski v Miicke

(*In re Est of Jank*)

[186 Wis. 2d 409](#)

(Ct. App. 1994)

- c. [Sec. 851.50](#) not to be applied retroactively

3) For deaths after 1/1/99, see [§ 854.20](#)

[§ 854.03](#)

C. If person who would be heir of decedent dies within 120 hours, except as provided in [§ 854.03\(5\)](#), of time of decedent's death, estate passes as if that person predeceased decedent

[§ 854.14](#)

Jackson v Gray

(*In re Est of Jackson*)

[186 Wis. 2d 439](#)

(Ct. App. 1994)

D. If person who would have been an heir under [§ 852.01](#) unlawfully and intentionally killed decedent, right to inherit is revoked

[§ 854.14\(5\)\(c\)](#)

Gedlen v

Unborn Children

(*In re Est of Safran*)

[102 Wis. 2d 79](#) (1981)

- 1) In absence of conviction, Ct may determine on basis of preponderance of the evidence whether killing was unlawful and intentional

[§ 854.14](#)

Lemmer v Schunk

(*In re Est of Schunk*)

[2008 WI App 157](#)

[314 Wis. 2d 483](#)

- 2) Assisting another person to commit suicide is not an act of "unlawful and intentional killing"

[§ 852.14](#)

E. A parent who abandons a child is not considered an heir

The personal representative or any other interested party may file a petition alleging that the parent abandoned a child by failing without cause to do ALL of the following for at least one year immediately before the minor child's death:

- 1) Communicate with the child
- 2) Care for the child as required by law or Ct order
- 3) Provide for child's maintenance or support as required by law or Ct order

§_852.01(3)

F. If no heirs, net estate escheats to State to be added to school fund

§_852.13

G. Any person to whom property would otherwise pass may disclaim any or all of property as provided in §_854.13

§_854.13

See [Sec. 8](#), **Right to Disclaim**, in **PR 2**

H. Disinheritance

Staaben v Jabs

(Est of Farber)

[57 Wis. 2d 363](#) (1973)

- 1) Under present law, if heirs disinherited but some of estate passes as intestate property, those heirs can inherit, absent clear intent to exclude

§_852.10

- 2) Express disinheritance of individual or exclusion from a class is effective for all purposes, including intestacy
- 3) Treat as if disclaimed under [§_854.13](#)

I. Debts owed to decedent

§_854.12

Under intestacy, the debt an heir owes a decedent is offset against the intestate share of the debtor heir

Est of Oaks

v Stouff

(In re Est of Oaks)

[2020 WI App 29](#)
[392 Wis. 2d 352](#)

J. The doctrine of gift *causa mortis* is an exception to the rules of intestacy

2. Related Rules

A. For deaths occurring on or after 1/1/99, succession is per stirpes under [§ 854.04](#)

[§ 854.21\(4\)](#)

B. Half-blood relatives take same share as if of whole blood

[§ 854.21\(5\)](#)

C. Person may be heir even though born after decedent's death if conceived before decedent's death

[§ 852.05](#)

3. Status of Child Born to Unmarried Parents

[§ 852.05\(1\)](#)

A. Child born to unmarried parents or issue of such a child entitled to take in same manner as marital child from and through

Hullum v Sullivan
[762 F. Supp. 1324](#)
 (N.D. Ill. 1991)

1) Mother

[§ 852.05\(1\)](#)

2) Father if he has

Caldwell v Kaquatosh
(In re Est of Blumreich)
[84 Wis. 2d 545](#) (1978)

- a. Been adjudicated during his lifetime to be father in paternity proceeding under [Ch. 767](#) or by final order or judgment of Ct in another state
- b. Admitted in open Ct that he is father
- c. Acknowledged self to be father in writing signed by him

CR v Amer
Standard Ins Co
[113 Wis. 2d 12](#)
 (Ct. App. 1983)

- Writing need not be in particular form or made for purpose of establishing paternity

[§_767.80](#)

d. Paternity determined by Probate Ct

DiBenedetto v Jaskolski
(In re Est of Thompson)
[2003 WI App 70](#)
[261 Wis. 2d 723](#)

- 19-year statute of limitation under [§_893.88](#) does not preclude determination

[§_852.05\(2\)](#)

B. Property of child born to unmarried parents passes in accordance with [§_852.01](#)

[§_852.05\(2\)](#)

Except that father or his kindred can inherit only if father has been adjudicated to be father in paternity proceeding under [Ch_767](#) or by final order or judgment of Ct in another state or been determined the father under [§_767.804](#) or [§_767.805](#) or a substantially similar law of another state

[§_852.05\(3\)](#)

C. [Sec.](#)

852.05 does not apply to

- 1) Child who becomes marital child by subsequent marriage of child's parents under [§_767.803](#)
- 2) Child born of unmarried parents who is legally adopted

Status governed by [§_854.20](#)

[§_852.09](#)

4. Assignment of Home to Surviving Spouse or Surviving Domestic Partner

[§_861.21\(2\)](#)

A. If intestate estate contains interest in home, interest may be assigned to surviving spouse or surviving domestic partner as part of that survivor's share

[§_861.21\(2\)](#)

- 1) To request assignment of decedent's interest, surviving spouse or surviving domestic partner must petition within 6 months after death unless Ct extends time for filing

§_861.21(2)

- 2) If married decedent or a decedent in a domestic partnership had property interest in home, decedent's entire interest in home assigned to surviving spouse or surviving domestic partner if petitions within 6 months after death and if governing instrument does not provide specific transfer of decedent's interest to one other than surviving spouse or domestic partner

Jones v Est of Jones

[2002 WI 61](#)

[253 Wis. 2d 158](#)

Spouse's homestead protection may be barred if waived by premarital agreement

§_861.21(4)

- 3) Interest in home shall be assigned to surviving spouse or surviving domestic partner upon payment of value of interest that does not pass under intestacy; payment shall be made within one year unless extended by Ct

§_861.21(1)(b)

- 4) *Home* means any dwelling in decedent's estate that surviving spouse or surviving domestic partner occupies or intends to occupy

Note: For a definition of *homestead*, see *Droukas v. Est of Felhofer (In re Est of Felhofer)*, [2014 WI App 6](#), [352 Wis. 2d 380](#).

a. Surviving spouse or surviving domestic partner may select any one from several dwellings

b. Includes but not limited to

- House
- Mobile home
- Manufactured home
- Duplex or multiple apartment building, one unit of which is occupied by surviving spouse or surviving domestic partner

- Building used in part for dwelling and in part for commercial or business purposes

5) Home includes all surrounding land unless Ct, in its discretion, severs part of remaining land

§_861.21(5)

a. Spouse, domestic partner, or interested person may petition Ct to sever part of surrounding land if

- Part not necessary for dwelling purposes, and
- Inappropriate to assign all surrounding land as home

b. In making determination, Ct must consider use and marketability of parcels set off as home and remaining land

§_852.11

§_854.09

5. When Gift Treated as Advance on Intestate Estate

§_854.09(1)

A. Gift by decedent during decedent's lifetime to an heir will only be considered by Ct to be an advance against heir's intestate share if

- 1) Writing by decedent states gift is advance whether or not contemporaneous with gift, or
- 2) Heir states by writing or in Ct that gift was an advance, or
- 3) Governing instrument provides that gift be taken into account

§_854.09(3)

B. Death of recipient of advancement before decedent

If transferee dies first, gift treated as full or partial satisfaction of transfer unless transferor declared otherwise in a document, either expressly or as construed from extrinsic evidence

§_854.09(2)

C. For partial satisfaction, value determined as of

- 1) Time heir comes into possession or enjoyment of property advanced, or
- 2) Time of decedent's death, if that occurs first

§_854.13

6. Right to Disclaim Intestate Share

See [Sec. 8](#), **Right to Disclaim**, in PR 2

PR 6: INFORMAL PROBATE PROCEDURE

1. Demand for Formal Administration

§_865.03

A. Formal proceedings may be initiated by personal representative or by any interested person

- 1) May be made at any time
- 2) Must be in writing

§_865.03(2)

B. If demand is for particular issue, after Ct completes formal portion of proceeding, matter reverts to informal

§_865.03(2)

C. Mandatory suspension of powers of personal representative while matter is formal

§_865.05

2. Notice to Creditors

See [Sec. 6, Creditors](#), in **PR 1**

3. Appointment of Personal Representative

[§_865.08\(1\)](#)

A. Upon receipt of application, and after making determinations required by [§_865.07](#), probate registrar may

- 1) Enter statement of informal registration
- 2) Admit will to informal probate, and
- 3) Appoint personal representative

[§_865.08\(1\)\(am\)](#)

a. If no personal representative named, or personal representative fails to qualify, personal representative to be either of following

- Bank or trust company that

— Is entitled to exercise fiduciary powers in Wis, and

— Has consent of all interested persons other than deceased's creditors

[§_865.08\(1\)\(am\)](#)

- Natural person who has consent of all interested persons other than creditors and who is not disqualified under [§_856.23](#). (See [PR 1 Sec. 7.A.](#) for disqualification provisions)

[§_865.08\(1\)\(b\)](#)

- 4) If decedent was nonresident, appointment delayed until 30 days have elapsed since death, unless applicant is domiciliary representative

[§_865.08\(1\)](#)

B. Appointment subject to qualification and acceptance

§_865.08(2)

- 1) To qualify, personal representative must file
 - a. Statement of acceptance of duties and
 - b. Any required bond

§_865.08(2)

- 2) By acceptance, personal representative submits to jurisdiction of Ct in any proceedings related to estate

§_865.08(3)

C. Denial of application

- 1) Probate registrar “shall deny” application if
 - a. Probate registrar not satisfied will entitled to be probated, or
 - b. Personal representative fails to meet requirements of §§_856.23, 865.02, or 865.07, or
 - c. For any other reason

§_865.08(4)

D. Issuance of letters to personal representative

Upon appointment and qualification, letters issued and estate administered, unless superseded or suspended by formal proceedings

§_865.08(5)

E. Within 10 days after appointment, personal representative must provide to each interested person

- 1) List of all interested persons, and
- 2) If estate testate, copy of will

[§_865.08\(6\)](#)

F. Letters of trust

- 1) If will provides for testamentary trust, probate registrar appoints trustee upon admission of will to informal probate at same time that letters to personal representative issued
 - a. Letters of trust not required; certification of trust under [§_701.1013](#) is sufficient evidence of authority of trustee
 - b. Bond requirements same as formal probate
- 2) Thereafter, trustee shall continue to be interested person, and beneficiaries shall cease to be interested, except under [§_851.21\(3\)](#)
- 3) Administration of trust governed by [Ch 701](#)

See Trusts, [PR 9](#)

4. Closing Estate

[§_865.16\(1\)](#)

A. Estate closed by personal representative filing with probate registrar verified statement that personal representative has

[§_865.16\(1\)\(a\)](#)

- 1) Duly given notice to interested persons (same as formal probate) and creditors (same as formal probate) and time for filing claims has passed

[§_865.16\(1\)\(b\)](#)

- 2) Fully administered estate by payment of all debts and distribution of estate assets to persons entitled to them

If some claims unpaid, personal representative must disclose arrangements

§_865.16(1)(c)

3) Sent copy of statement to

a. Distributees and

b. Creditors whose claims are

- Unpaid and
- Not barred

§_865.16(1)(c)

4) Furnished full account in writing to distributees

§_865.16(1m)

B. Probate registrar may review Atty fees and, if unreasonable, refer to Ct

§_865.21

C. Receipts from all distributees filed

§_865.16(2)

D. If no proceeding challenging statement pending within 6 months after statement filed, personal representative is discharged

5. Limitation on Proceedings Against Personal Representative

§_865.18

A. Claims barred unless action commenced within 6 months after filing statement

B. Action not barred if based on

- 1) Fraud
- 2) Misrepresentation, or
- 3) Inadequate disclosure related to settlement of decedent's estate

6. Liability of Distributees to Claimants

§_865.17

A. After assets of estate distributed, and subject to §_865.19, claim not barred by notice under §_859.07 or otherwise may be prosecuted against one or more distributees

- 1) No distributee liable for more than value of distribution at date of distribution
- 2) Among distributees, each to bear cost of satisfaction as if claim satisfied in course of administration

7. Limitation on Proceedings Against Distributees

§_865.19(1)

A. Claim against distributee barred at later of

§_865.19(1)(a)

- 1) 3 years after decedent's death

§_865.19(1)(b)

- 2) 1 year after time of distribution

§_865.19(2)

B. Action not barred if

- 1) Based on fraud or

- 2) By creditor if notice under [§_859.07](#) not given

8. Termination of Joint Tenancy or Life Estate

[§_865.20\(1\)](#)

A. Used as alternative to [§§_867.04](#) (described in [PR 8, Sec. 6](#)) and [867.045](#) (described in [PR 8, Sec. 7](#))

B. Procedure

- 1) Personal representative files with probate registrar verified statement of joint property or life estate

[§_865.20\(2\)](#)

- 2) Upon filing, statements constitute prima facie evidence of facts recited with same effect as if [§_867.04](#) used

[§_865.20\(2\)](#)

- 3) If real estate involved, certified copy or duplicate original of statement may be recorded with register of deeds

[§_854.13](#)

C. Right to disclaim share

See [Sec. 8, Right to Disclaim](#), in [PR 2](#)

9. Confirmation of Interest in Property (Marital Property)

[§_865.201\(1\)](#)

A. Used as alternative to [§_867.046](#)

See [PR 8, Sec. 3](#), for [§_867.046](#) procedure

B. Procedure

- 1) Personal representative files with probate registrar verified statement describing property
 - a. In which decedent had interest in survivorship marital property, or
 - b. In which anyone has interest passing by nontestamentary distribution under [§_705.15](#), [§_705.18](#), or [§_766.58\(3\)\(f\)](#) nontestamentary marital property agreement
- 2) Upon filing, statements constitute prima facie evidence of facts recited, with same effect as if [§_867.046](#) had been used
- 3) If real estate involved, statement may be recorded with register of deeds

[§_865.201\(2\)](#)

[§_865.201\(2\)](#)

PR 7: POWERS AND DUTIES OF PERSONAL REPRESENTATIVE (INFORMAL PROBATE)

1. When Personal Representative May Proceed

[§_865.09\(1\)](#)

A. Personal representative to whom letters issued by probate registrar in informal administration has all powers of personal representative to whom letters issued through formal administration

[§_865.09\(2\)](#)

B. Duties and powers commence upon appointment

Powers relate back in time to acts before appointment that are beneficial to estate

[§_865.10\(1\)](#)

C. Personal representative to proceed with settlement and distribution of estate without adjudication or order of Ct

- 1) At any time, personal representative may invoke authority of Ct to resolve questions concerning estate or its administration
- 2) Subject to other obligations of administration, an informally probated will is authority to administer and distribute decedent's estate according to its terms

D. Exception

§_865.10(2)

- 1) Any determination is subject to redetermination by Ct in formal judicial proceedings at any time before
 - a. Termination of appointment of personal representative or
 - b. Entry of final judgment
- 2) Any such redetermination shall not affect
 - a. Right of bona fide purchasers and
 - b. Other third parties dealing in good faith with informally appointed personal representative

2. Personal Representative to File Inventory

§_865.11(1)

A. Personal representative to prepare inventory of property owned by decedent at time of death, setting forth

- 1) Fair market value and
- 2) Amount of encumbrances

§_865.11(2)

B. Personal representative to furnish copy of inventory to interested parties**C. Personal representative to exhibit inventory to, but need not file inventory with, probate registrar****D. Employment of appraisers**[§_865.12](#)

- 1) Personal representative may employ qualified appraisers to ascertain value of assets
- 2) Any interested person may invoke jurisdiction of Ct to require an appraisal or to contest appraisals

3. Personal Representative May Pay Claims[§_865.13](#)**A. Whether or not claim filed, personal representative may pay in good faith just demands against estate**

- 1) Within time for filing claims, or
- 2) At any time with consent of all heirs or beneficiaries affected by payment

B. In paying claims, personal representative may deduct counterclaim that estate has against claimant**C. Any claim filed is allowed or disallowed according to [Ch](#) 859 if contested and demand for formal proceedings filed****PR 8: PROBATE ALTERNATIVE/SUMMARY PROCEEDINGS****1. Summary Settlement**

A. Availability

- 1) Whenever estate, less amount of debts for which any property in estate is security, does not exceed in value

§_867.01(1)(a)

- a. Costs, expenses, allowances, and claims under §_859.25(1)(a)–(g)

§_867.01(1)(b)

- b. \$50,000, and decedent survived by spouse or a domestic partner or one or more minor children or both

B. Procedure

- 1) Petition

§_867.01(3)

§_856.07

- a. Any person who has standing to petition for administration has standing to petition for summary settlement

§_867.01(3)(am)

- b. Contents

- Facts of A.1)a. or b. above
- Detailed statement of all property, in which decedent had interest, subject to administration, including all encumbrance, lien, or other charge upon each item
- Names and post-office addresses of all interested persons ascertainable with reasonable diligence, stating who are minors or under disability and names and post-office addresses of guardians

§_867.01(3)(am)4.

- Whether decedent or decedent's spouse received medical assistance under subch IV of [Ch 49](#), long-term community support services funded under §_46.27(7) (2017–18), aid under §§_49.68, 49.683, 49.685, or 49.785, or other benefits specified under §_867.01(3)(am)4.

§_867.01(3)(d)

2) Hearing

- a. Ct may hear matter without notice to interested persons or creditors or require that it be given under [§ 879.03](#)
- b. But, if decedent or decedent's spouse received medical assistance under subch IV of [Ch 49](#), long-term community support services funded under [§ 46.27\(7\)](#) (2017–18), aid under [§§ 49.68, 49.683, 49.685](#), or [49.785](#), or other benefits specified under [§ 867.01\(3\)\(d\)](#), petitioner must give notice by certified mail to DHS

3) Ct does not appoint a personal representative

[§ 867.01\(3\)\(b\)](#)

Ct may appoint special administrator to aid in settlement

[§ 867.01\(3\)\(f\)](#)

4) Order

- a. If Ct satisfied estate can be settled under [§ 867.01](#), and 30 days have elapsed since notice given to DHS, Ct to
 - Assign property to entitled persons
 - Order any person indebted to or holding money or property of decedent to pay indebtedness or deliver property to person entitled to receive it
 - Order transfer of interests in all property registered in decedent's name
 - Terminate any life estates or joint tenancies in which decedent had interest before death, not terminated previously
 - Specifically describe every tract of real property in which interest assigned or terminated or that is security for debt in which interest assigned or terminated

- b. If disposition as in A.1)b. above, any property not otherwise assigned must be assigned to surviving spouse or surviving domestic partner or minor children or both as allowance under §_861.31

§_867.01(3)(g)

- c. Ct may require petitioner to notify all known unsatisfied creditors as to final disposition of estate

§_867.01(3)(h)

- d. If order relates to interest in real property or debt secured by interest in real property, certified copy or duplicate original filed with register of deeds in each Cty in Wis where property located

5) Miscellaneous

§_867.01(2)

- a. If found to meet requirements, any method of estate administration commenced may be completed pursuant to §_867.01

§_867.01(3)(c)

- b. Ct may require bond of petitioner in amount deemed sufficient
- Conditioned to indemnify any person who may be aggrieved by order

Recommendation

- c. If there is will, generally not admitted to probate but filed with Ct documents

§_867.01(5)

- d. Any party may commence or appear at a proceeding under §_867.01 in party's behalf or by an Atty, or, if in military service, by Atty-in-fact, but not otherwise

2. Summary Assignment

§_867.02(1)

A. Availability

Whenever estate, less amount of debts for which property in estate is security, does not exceed \$50,000 in value and summary settlement not available

B. Procedure

1) Petition

§_867.02(2)(ac)
§_856.07

- a. Any person who has standing to petition for administration has standing to petition for summary assignment

§_867.02(2)(am)

- b. Contents

- Satisfaction of [A.](#) above
- Statement as to whether, after exercise of reasonable diligence, petitioner located decedent's will
- Detailed statement of all decedent's property, subject to administration, including any encumbrance, lien, or other charge upon each item

— May be omitted from petition if included in affidavit filed with Ct before signing order assigning estate

- Names and post-office addresses of interested persons ascertainable with reasonable diligence, indicating who are minors or otherwise under disability and names and post-office addresses of their guardians
- Names and post-office addresses of creditors of estate and amount claimed by each

— May be omitted from petition if included in affidavit filed with Ct before signing order assigning estate

§_867.02(2)(am)6.

- Whether decedent or decedent's spouse received medical assistance under subch IV of [Ch](#) 49, long-term community support services funded under §_46.27(7) (2017–18), aid under §_49.68, 49.683, 49.685, or 49.785, or other benefits specified under §_867.02(2)(am)6.

§_867.02(2)(b)

2) Will

Decedent's will filed with petition

[§ 867.02\(2\)\(d\)](#)

3) Notice

- a. Ct can hear matter, including proof of will, with or without notice
- b. Notice to creditors published as class 1 notice in newspaper published in Cty under [Ch 985](#)

Recommendation

- c. When setting final hearing date, set at least 45 days from date of order giving notice

[§ 867.02\(2\)\(g\)](#)

[RMC Form PR-1844](#)

4) Order

- a. If Ct satisfied that estate can be settled under this section, after filing of petition and proof of will, and after 30 days have elapsed since creditor's publication, Ct to
 - Assign property to entitled creditors and interested persons
 - Order any person indebted to or holding money or property of decedent to pay indebtedness or deliver property to person entitled to receive it
 - Order transfer of all property interests registered in decedent's name
 - Terminate any life estates or joint tenancies in which decedent had interest before death, not otherwise terminated
 - Specifically describe every tract of real property in which interest assigned or terminated or that is security for debt in which interest assigned or terminated

[§_867.02\(2\)\(f\)](#)

- b. Ct does not appoint a personal representative; may appoint special administrator to aid in settlement

[§_867.02\(2\)\(g\)](#)

- c. Assignment of property subject to unknown rights of creditors or persons interested in estate as set forth in [§_867.02\(4\)](#)

[§_867.02\(2\)\(h\)](#)

- d. If order relates to interest in real property or debt secured by interest in real property, certified copy or duplicate original filed with register of deeds in each Cty in Wis where property located

5) Miscellaneous

[§_867.02\(1\)](#)

- a. Any method of estate administration commenced may be completed pursuant to [§_867.02](#) if found to meet requirements

[§_867.02\(2\)\(c\)](#)

- b. Ct may require bond of petitioner or assignees before making order
 - Conditioned to indemnify any person who may be aggrieved by order
 - Before assigning property, may require bond from assignees for satisfaction of liability to creditors or persons interested
- c. Order for Summary Assignment makes finding as to heirs of decedent and thus Ct may wish to take proof of heirship before entry of order
 - See **PR 1, [Sec. 5](#), Determination of Heirs**

[§_867.02\(4\)](#)

- d. Creditors and interested persons not assigned property to which entitled may recover from assignees who benefited from incorrect assignments, or their bonding company

- Assignee or bonding company not liable for amount greater than value of property assigned to assignee from estate
- No creditor action for recovery may be brought more than 3 months after publication of Ct order

Tulsa Prof'l Collection
Servs, Inc v Pope
[108 S. Ct. 1340](#) (1988)
Sears, Roebuck & Co
v Plath
(In re Est of Barthel)
[161 Wis. 2d 587](#) (1991)

— However, to be effective against specific creditor, notice must be mailed to all creditors whose identity known or “reasonably ascertainable”

- No action by interested person for recovery may be brought more than 3 months after copy of Ct order mailed or delivered
- No action by person whose name or address unknown may be brought more than 3 months after copy of Ct order mailed or delivered to any interested person

§_867.02(5)

- e. Any party may commence or appear at such proceeding in party’s behalf or by an Atty, or, if in military service, by Atty-in-fact, but not otherwise

3. Summary Confirmation of Interest in Survivorship Marital Property and Nontestamentary Marital Property Agreement (Washington Will)

§_867.046(1m)

A. Ct proceeding

1) Petition

- a. If domiciliary of Wis dies and had interest in property in Wis, or if not domiciled here but had interest in property in Wis, following may petition for certificate

- Decedent's spouse or

§_766.58(3)(f)

- Designated person, trust, or other entity having interest in any property passing by nontestamentary disposition under §_766.58(3)(f) marital property agreement "Washington will"

b. Petition is to

- Ct of Cty of decedent's domicile or
- If decedent not domiciled in Wis, Ct where property is located

2) Certificate to set forth

- a. Fact of death
- b. Termination of decedent's interest
- c. Petitioner's interest
- d. Any other facts essential to determination of rights of persons interested

3) Certificate is prima facie evidence of facts recited

4) If relates to real property or debt secured by interest in real property, petitioner to record certified copy or duplicate original in office of register of deeds in each Cty in which property is located

§_867.046(2)

B. Alternative method by application at register of deeds

§_867.046(2)

1) Availability

a. Upon death of any person having interest in

- Any real property
- Vendor's interest in land contract
- Savings or checking account
- Mortgagee's interest in a mortgage
- Property passing under [§_705.10\(1\)](#)) or [§_705.18\(2\)](#)

b. May be used by following to obtain evidence of termination and confirmation of **applicant's** interest

- Decedent's spouse
- Designated person, trust, or other entity having an interest in any property passing by nontestamentary disposition under [§_766.58\(3\)\(f\)](#) marital property agreement

[§_867.046\(2m\)](#)

- Any interested person if, within 90 days after decedent's death, proceedings not commenced to confirm interest under this section or [§_863.27](#) or [§_865.201](#)

2) Procedure

[§_867.046\(2\)](#)

a. Filing of application

- Petitioner prepares form HT-110 and TOD-110 (provided by register of deeds)

§_867.046(3)

b. Completion of application

- Register of deeds completes form HT-110 and TOD-110

c. Recording

§_867.046(4)

- Register of deeds “shall mail or deliver” copy of application to Ct of decedent’s Cty of residence, unless clerk of Ct notifies register of deeds in writing that procedure not necessary

§_867.046(5)

- Upon recording, application constitutes

— Prima facie evidence of facts recited and

— Termination with same force and effect as if issued by Ct assigned to exercise probate jurisdiction for decedent’s Cty of domicile under §_867.04

§_867.05

4. Certificate of Descent of Property

§_867.05(1)

A. Availability

- 1) Six or more years must have passed after person died intestate and no other probate proceeding
- 2) Must be estate that Ct in Wis has jurisdiction to administer

See §_868.05 for nonresident

B. Procedure

1) Petition

- a. Any person interested in estate or its property may petition Ct with jurisdiction to administer the estate
- b. Petition must be verified and show as particularly as can be known with due diligence
 - Time, place of death, and domicile of decedent
 - That estate has not been administered
 - Names, post-office addresses, and relationships to decedent of all heirs and their grantees, stating who are minors or under legal disability and names and addresses of their guardians
 - A description of all property for which determination of descent is sought

2) Notice

[§_867.05\(2\)](#)

- a. Ct may hear matter without notice

[§_867.05\(3\)](#)

- b. Notice can be required in accordance with [§_879.03](#)

3) Disposition

[§_867.05\(2\)](#)

- a. Proceeding without notice
 - Ct to hear evidence and decide who are heirs and their respective rights and interests in property
 - Ct to issue certificate of descent naming persons entitled to interests in property and property to which each person is entitled

- Certificate is prima facie evidence of facts recited

§ 867.05(3)

b. Proceeding with notice

- Ct to hear evidence and decide who are heirs and their respective rights and interests in property

[RMC Form PR-1948](#)

- Ct to issue judgment of descent naming persons entitled to interests in property and property to which each person is entitled

§ 867.05(4)

- c. If certificate or judgment relates to interest in real property or debt secured by interest in real property, certified copy or duplicate original filed with register of deeds in Cty where property located

5. Special Administration

A. Availability

§ 867.07

[RMC Form PR-1852](#)

- 1) Whenever Ct would have jurisdiction for administration of decedent's estate, Ct may appoint special administrator if it appears that

§ 867.07(1)

- a. No estate to be administered and an act should be performed on part of decedent

§ 867.07(2)

- b. Final judgment of distribution entered and an act remains unperformed

§ 867.07(2)

- c. Unadministered estate assets found

§ 867.07(3)

- d. Estate can be settled under § 867.01 or § 867.02

§_867.07(4)

- e. Necessary to conserve or administer estate before personal representative appointed

§_867.07(5)

- f. Circumstances provided for in §_867.05(5) and (6) exist

§_867.07(6)

- g. Cause of action exists for or against decedent and act must be performed before personal representative appointed

§_867.07(7)

- h. Other circumstances exist that in discretion of Ct require appointment

§_867.09

B. Petition

- 1) Any person may petition who has standing to petition for administration of estate
- 2) §_856.07 waiting periods do not apply

§_867.11

C. Notice

- 1) Ct may hear matter without notice if deemed unnecessary or inexpedient
- 2) Ct may require notice pursuant to §_879.03

D. Bond

§_867.13

- 1) If anything of value to come into hands of special administrator, Ct may require reasonable bond

§_867.13

- 2) No bond to be required of any trust company bank, state bank, or national banking association authorized to exercise trust powers that has complied with §_220.09 or §_223.02

§_867.13

- 3) If special administrator subsequently made personal representative, bond given as special administrator remains in effect

§_867.15

E. Order appointing special administrator is nonappealable order

§_867.17

F. Powers, duties, and liabilities of special administrator

§_867.17

- 1) If appointed without notice, has only powers and duties specifically granted by order of Ct

§_867.17

- 2) Upon hearing, Ct may grant same powers as personal representative except as limited by Ct

§_867.17

- 3) By order, Ct may expressly grant powers and impose duties in addition to those granted by statute to personal representative

If necessary to accomplish purposes for which special administrator appointed

Lecic v Lane Co

(In re Est of Lecic)

[104 Wis. 2d 592](#) (1981)

- 4) Special administrator has no duty to disclose deadline for filing claims against estate

Required notice to creditors is by publication only

§_867.19

G. Compensation of special administrator

- 1) Special administrator allowed all necessary expenses incurred and compensation for services as Ct deems reasonable

§_867.19

- 2) If subsequently appointed personal representative, compensation as special administrator may be fixed at time compensation as personal representative determined

§_867.21

H. Termination

[§_867.21\(1\)](#)

1) If no personal representative appointed

[RMC Form PR-1855](#)

- a. When duties properly performed, Ct must discharge special administrator
- b. Ct may require any reports Ct deems necessary
- c. Discharge may be granted with or without notice
 - If notice required, given under [§_879.03](#)

[§_867.21\(2\)](#)

2) If personal representative appointed

- a. Upon granting letters to personal representative, power of special administrator ceases
- b. Account to be filed and all property of estate delivered to personal representative
 - Ct may accept written receipt of personal representative as evidence of delivery
- c. Upon approval of account, Ct to discharge special administrator
- d. If special administrator appointed personal representative, no accounting as special administrator necessary unless bond not continued
 - If no accounting made as special administrator, personal representative account to include account of special administration

[§_867.04](#)

6. Formal Termination of Life Estate or Joint Tenancy

A. Petition

- 1) Venue in Ct of Cty where decedent domiciled or, if decedent was nonresident, in Cty where property located
- 2) Any person with interest in property may sign petition

B. Certificate

- 1) Issued by Ct when life estate or joint tenancy formally terminated
- 2) To set forth
 - a. Fact of death
 - b. Termination of life estate or joint tenancy interest
 - c. Right of survivorship of any joint tenant
 - d. Other facts essential for determination of rights of persons interested
- 3) Is prima facie proof of facts recited
- 4) If relates to interest in real property or debt secured by interest in real property, certified copy or duplicate original filed with register of deeds in each Cty in Wis where property located

§ 854.13

C. Right to disclaim share

See [Sec. 8, Right to Disclaim](#), in PR 2

7. Termination of Joint Tenancy or Life Tenant's Interest by Administrative Transfer

§ 867.045(1)

A. Availability

1) Administrative transfer may be used to transfer following

- a. Real property
- b. Vendor's interest in land contract
- c. Mortgagee's interest in mortgage
- d. Life tenant's interest in real property

§ 867.045

B. Procedure

§ 867.045(1)

1) Filing of application

OAG 2-98

- a. Completed application form HT-110 and TOD-110 (provided by register of deeds) filed with register of deeds with following

- Real estate tax bills for immediately preceding year, and

§ 867.045(1)(j)

— May be waived by agreement between register of deeds and Cty property lister

- Legal description of real estate

2019 Wis Act 127

- b. A certified copy of a death record is no longer required

§ 867.045(2)

2) Completion of application

- a. Register of deeds completes form HT-110 and TOD-110

3) Recording

§_867.045(4)

- a. Upon recording, application constitutes

- Prima facie evidence of facts recited and
- Termination with same force and effect as if issued by Ct assigned to exercise probate jurisdiction for decedent's Cty of domicile under §_867.04

§_867.03(1g)

8. Transfer by Affidavit

A. Administrative procedure that does not involve Ct used if decedent leaves property subject to administration that does not exceed \$50,000 in gross value

Note: Transfer by affidavit will probably not be accepted by transfer agent to change ownership of stocks and bonds. Special administrator may be appointed to facilitate transfer

B. Any heir or guardian of the decedent, any trustee of a revocable trust created by the decedent, or a person named in the decedent's will to act as personal representative may collect any money due decedent and receive decedent's property, including any interest in or lien on real property

§_867.03(2m)

§_867.03(1p)

- 1) Certified copy or duplicate original of affidavit must be submitted for recording in office of register of deeds, after 30 days' notice to heirs, for transfer of real estate with the following attachments:
 - a. Proof of providing notice to the decedent's heirs under §_867.03(1p), as described in §_879.07(1) or (2), at least 30 days before submitting the affidavit under §_867.03(1g) to office of register of deeds

b. Proof of prior mailed notice under § 867.03(1m)

§ 867.03(2g)

- 2) Property collected must be applied to payment of obligations under § 859.25 and the balance distributed according to will, or intestacy, if no will

§ 867.03(2g)

- 3) Heir or guardian of a decedent may publish notice to creditors in same manner as trustee under § 701.0508
- 4) A personal representative may not receive any interest in real property unless exceptions of § 867.03(1h) apply
- 5) A person receiving affidavit requesting transfer of money, property, or real interest may not transfer asset prior to 30 days after receipt of request unless exception in § 867.03(1j)(a) applies

§ 867.03(2m)(c)

- 6) If interest in real property transferred by affidavit under § 867.03 is acquired by purchaser/lender in good faith, for value, and without actual notice that the transfer was improper, purchaser/lender takes title free of any claims of decedent's estate and incurs no personal liability to estate, whether or not transfer was proper. Purchasers and lenders have no duty to inquire whether a transfer was proper

§ 867.03(1m)

C. Notice to DHS

- 1) If heir or guardian or trustee of a revocable trust created by of decedent, or a person named in the decedent's will to act as personal representative knows, or reasonably believes decedent or decedent's spouse ever received medical assistance under subch IV of [Ch 49](#), long-term community support services under § 46.27(7) (2017–18), aid under § 49.68, 49.683, 49.685, or 49.785, or other benefits specified in § 867.03(1m), then heir or guardian of decedent must give notice to DHS by certified mail, as provided under § 867.03(1m)

§ 342.17

D. May be used for transfer of motor vehicle

Surviving spouse or surviving domestic partner can use DMV procedures for auto of any value or multiple autos

9. Ancillary Probate Procedure

§ 868.01(1)

A. Jurisdiction

§ 868.01(8), § 879.01

- 1) Jurisdiction generally invoked by verified petition

2) Available when nonresident owns property in this State

§_868.01(8), §_856.01(2)

Will may be filed in any Cty within State in which decedent's property located

§_868.01(1), (7)

3) Authenticated copy of will and proof of admission of will in domiciliary jurisdiction must be provided

4) Who may petition

See [PR 1, Sec. 1.C.](#)

§_868.01(5)

5) Procedure may be original probate if will is not rejected in another state or when there is no probate in domiciliary state

§_868.03(13)

B. General probate procedures shall apply except for special provisions

1) Appointment of GAL, Atty for military personnel

See [PR 1, Sec. 3](#)

2) Notice

See [PR 1, Sec. 4](#)

3) Determination of heirs

See [PR 1, Sec. 5](#)

§_868.03(9)

4) Creditors

See [PR 1, Sec. 6](#)

5) Appointment of Personal Representative

- a. See [PR 1, Sec. 7](#)

§_868.03(5)

- b. Appointment conditional upon personal representative appointing register in probate as agent for service of process

6) Inventory and Accounts

See [PR 3, Secs. 3](#) and [4](#)

7) Closing Estate

- a. See [PR 1, Sec. 9](#)

§_868.03(7)

- b. Assets may be assigned to domiciliary jurisdiction

§_868.05

C. Certificate of assignment

If decedent dead more than 6 years, certificate of assignment available as abbreviated process

10. See [§_877.16](#) for Alternatives to Ancillary Administration

PR 9: TRUSTS

1. Trust Procedure/Jurisdiction

§_701.0201

A. Jurisdiction

§_701.0201(2), [§_701.1205](#)

- 1) A trust is not subject to continuing judicial supervision unless ordered by the Ct upon a petition of a settlor, trustee, or qualified beneficiary

- 2) Proceeding involving a trust may be commenced by any person interested in trust. The proceeding may involve any of the issues listed in [§_701.0201\(3\)](#)

[§_701.0201\(4\)](#)

- 3) Except as otherwise provided in [Ch](#) 701, probate procedure in [Ch](#) 879 applies to all proceedings

4) Personal jurisdiction

[§_701.0202\(1\)](#)

- a. Over a trustee, trust protector, or directing party of a trust who accepts an appointment for a trust with its principal place of administration in Wis or who continues to serve in the same role for a trust if the principal place of administration moves to Wis. See [Sec. 2.A.](#), *infra*, and [§_701.0103](#) for definitions

[§_701.0202\(2\)](#)

- b. Over a beneficiary of a trust if the trust has its principal place of administration in Wis, and over a recipient who accepts a distribution from a trust having its principal place of administration in Wis regarding any matter involving the trust

[§_701.0202\(3\)](#)

- c. Over an agent who accepts a delegation of a trust function of a trust with its principal place of administration in Wis

[§_701.0204](#)

B. Venue

- 1) Cty where the trust's principal place of administration is or will be located
- 2) If there is no trustee, in the Cty where a beneficiary resides, where the trust property is, or where the holder of trust property maintains an office
- 3) For testamentary trust if the decedent's estate is still open, the Cty where the estate is being administered
- 4) Venue for proceedings involving living trust is governed by [§§_801.50–.62](#) and regarded as civil action for that purpose

§_801.05

§_801.07

Norton v Bridges

[712 F2d 1156](#)

(7th Cir 1983)

- 5) Removal to Federal Ct denied in case of petition to appoint successor trustee when the will provided Circuit Ct with power of appointment

Risher v Am Sur Co

(*Will of Risher*)

[227 Wis. 104](#) (1938)

- 6) Wis trust statutes apply to administration in Wis only

Boyle v Kempkin

[243 Wis. 86](#) (1943)

Wis trust statutes apply to real estate located in Wis

§_701.0205

C. Notice

- 1) If notice of a judicial proceeding involving a trust is required by law or deemed necessary, then Ct must order notice given under §_879.05
- 2) Service by publication not required unless ordered by Ct
- 3) Notice given to interested person, interested person's representative or GAL, or other persons required by law or deemed necessary by Ct
- 4) Ct may order both personal service and service by publication on designated persons
- 5) Interested person or representative or GAL may waive in writing service of notice and consent to hearing of any matter without notice
- 6) Waiver of notice or appearance by interested person or representative or GAL is equivalent to timely service of notice

§_701.0206

D. Atty for person in military service

- 1) At time of filing petition for judicial proceeding involving a trust, the petitioner must file an affidavit setting forth name of any interested person actively engaged in US military service
- 2) Whenever it appears by affidavit or otherwise that any person in active US military service is an interested person and not represented by Atty or Atty in fact duly authorized to act on person's behalf in matter, Ct must appoint Atty to represent person

E. Ct appointment of representative

§_701.0305

- 1) Ct may appoint a GAL or a “representative” for a person whose interest is not represented or is inadequately represented. The GAL or representative may be appointed for several persons or interests

§_701.0305

- 2) The GAL or representative may receive notice, give consent, and otherwise represent, bind, and act on behalf of the person

§_701.0306

- 3) With some limitations, a settlor in a trust instrument may designate person(s) to represent and bind a beneficiary

§_701.0307(1), (2)

- 4) The GAL or representative may act on behalf of the person in any matter under [Ch 701](#) whether or not there is a judicial proceeding pending, and may consider any general benefit accruing to the living members of the individual's family

§_701.0111

F. Nonjudicial settlement agreements

§_701.0111(5)

- 1) Parties may enter into nonjudicial settlement agreements construing the trust, approval of accountings, resignation or appointment of trustee, removal and replacement of trustee, modification of trust, or any other matter that would normally require Ct approval

§_701.0111(6)

- 2) Any interested or other person affected may request Ct approval of any nonjudicial settlement agreement to determine whether all parties were adequately represented under sub. III (“Representation,” [§§_701.0301–.0308](#)) or whether the agreement could have been approved, ordered, directed, or otherwise determined by the Ct

2. Creation, Modification, and Termination of Trusts

§_701.0103

A. Definitions

§_701.0103(23)

§_701.0113

§_701.1325

- 1) *Settlor* is a person, including a testator, who creates or contributes property to a trust, with further distinctions in §§_701.0113 and 701.1325

§_701.0103(27)

§_701.0407

- 2) *Terms of trust* means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding, or as may be established by court order or nonjudicial settlement agreement. Oral trust must be established by clear and convincing evidence

§_701.0103(3)

- 3) *Beneficiary* means a person who (a) has a present or future beneficial interest in a trust that is vested or contingent, (b) holds a power of appointment over trust property in a capacity other than a trustee, trust protector, or directing party, or (c) is an identified charitable organization that will or may receive distributions under the terms of the trust

§_701.0103(7)

- 4) *Directing party* means a person, other than a trustee or trust protector, who in a trust instrument or Ct order is granted the authority to direct a trustee's investment or distribution decisions or to directly make the investment and distribution decisions

§_701.0103(31)

- 5) *Trust protector* means a person, other than a trustee or directing party, who is granted a power in a trust instrument or Ct order

§_701.0103(30)

- 6) *Trust instrument* means a record signed by the settlor to create a trust, or by any person to create a second trust as provided under sub. XIII (Uniform Trust Decanting Act, §§_701.1301–.1327), that contains some or all of the terms of the trust and includes any amendments or modifications

§_701.0103(20)

- 7) *Property* means anything that may be the subject of ownership, whether real or personal, legal or equitable, or digital property, as defined in §_711.03(10)

§_701.0401

B. Creation of trusts—trusts may be created by any of the following

- 1) Transfer of property to another person as trustee during settlor's life, by will, or by other disposition taking effect upon settlor's death

- 2) Declaration by a settlor that property is in trust or will be in trust
- 3) An exercise of a power of appointment in favor of a trustee
- 4) Ct order
- 5) Guardian of the estate or a conservator with approval of Ct
- 6) Representative payee
- 7) Agent under a POA that expressly grants authority to create a trust

§_701.0401(5m)

- 8) A declaration of an intent to create a trust with the intention that the trust will later be funded by assets of the person who created the trust or by another person with legal authority to fund the trust. The person making the declaration is considered to have created the trust, regardless of whether the person funds the trust with the person's own assets

§_701.0402

C. Requirement—a trust is created if the following are satisfied

- 1) Settlor has the capacity to create a trust unless created by Ct order or by guardian, conservator, representative payee, or agent. The capacity to create a trust is the same as the capacity to create a will
- 2) Settlor indicates an intention to create a trust
- 3) Trust has a definite beneficiary who can be ascertained at the time the trust is created or in the future
- 4) If there is no definite beneficiary, the trust is
 - a. A charitable trust

- b. A trust for care of an animal
 - c. A noncharitable trust with a valid purpose under [§ 701.0409](#)—see [Sec. F.4](#)) below
- 5) The trustee has duties to perform
- 6) The same person is not the sole trustee and sole beneficiary, and there are no remainder beneficiaries other than the person's estate

D. Constructive trust

- 7) A trust imposed by Ct of equity to prevent unjust enrichment when

*First Nat'l Bank
v Nennig*
[92 Wis. 2d 518](#), 539
(1979)

- a. One receives benefit, retention of which would be unjust as against the other party, and

Wilharm v Wilharm
[93 Wis. 2d 671](#), 678–79
(1980);
cf. Krueger v Rodenberg
[190 Wis. 2d 367](#)
(Ct. App. 1994)

- b. Some additional factor, such as obtaining benefit by actual or constructive fraud, duress, abuse of confidential relationship, mistake, commission of wrong, or any form of unconscionable conduct

[§ 853.11\(3m\)](#), [§ 854.14](#)
*Gedlen v
Unborn Children*
(*In re Est of Safran*)
[102 Wis. 2d 79](#) (1981)

- Plea of no contest to reckless homicide does not require imposition of constructive trust on beneficiary of will; finding of unlawful and intentional killing of settlor required

Tikalsky v Friedman
[2019 WI 56](#), ¶ 1
[386 Wis. 2d 757](#)

- 8) A constructive trust is a remedy, not a cause of action

Under the proper circumstances, a constructive trust may be imposed on property in the possession of one who is wholly innocent of any inequitable conduct

[§ 701.0403](#)

E. Trust created in other jurisdictions not created by will

- 1) Is valid if its creation complies with the law of the jurisdiction in which
 - a. The trust instrument was executed, OR
 - b. The settlor was domiciled, had a place of abode, or was a national, OR
 - c. The trustee was domiciled or had a place of business, OR
 - d. Any trust property was located

F. Purposes of trust

§_701.0404

- 1) A trust can be created for any purposes that are lawful and possible to achieve

§_701.0103(3x), (4)

- 2) A charitable trust may be created for the purposes (as defined in §_701.0103(3x)) the achievement of which is beneficial to the community

§_701.0408

§_701.0103(1n)

- 3) An animal trust (as defined in §_701.0103(1n)) for an animal alive during the settlor's life terminates upon the death of the animal. The Ct can order the distribution of trust property exceeding the amount required for the care of the animal

§_701.0409

- 4) A noncharitable trust can be created without a definite beneficiary if it is for a valid purpose to be selected by the trustee, such as maintaining a grave and tombstone. The Ct can order the distribution of trust property exceeding the amount required for the intended use

§_701.0411

G. Modification or termination of noncharitable irrevocable trusts

§_701.0411(1)

- 1) Can be done without Ct approval if consented to by settlor and all beneficiaries even if the modification or termination is inconsistent with a material purpose of a trust

§_701.0410(2)

- 2) The settlor, trustee, or beneficiary can petition the Ct for modification or termination

§_701.0411(2)

- 3) Upon the consent of all the beneficiaries and a finding that the continuation of the trust is not necessary to achieve any material purpose of the trust, the Ct can terminate the trust
- 4) Upon the consent of all the beneficiaries and a finding that the modification is not inconsistent with a material purpose of the trust, the Ct can modify the trust

§_701.0411(6)

- 5) If not all the beneficiaries consent to the proposed termination or modification, the Ct can terminate or modify the trust
 - a. If all of the beneficiaries had consented, the trust could have been modified or terminated, AND
 - b. The interest of the beneficiary who does not consent is adequately protected

§_701.0412

H. Modification or termination because of unanticipated changes

- 1) A party can petition the Ct for modification or termination because of circumstances not anticipated by the settlor
- 2) The Ct can modify or terminate the trust if such action will further the purposes of the trust. To the extent practicable, the changes should be made in accordance with the settlor's probable intent
- 3) The Ct can modify administrative terms of a trust, if continuation under the existing terms would be impracticable or wasteful or impair the trust's administration

§_701.0413

I. *Cy pres*

- 1) The purpose of §_701.0413 is to broaden the power of the Cts to make charitable gifts more effective and to liberally apply the *cy pres* doctrine
- 2) If a charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful, the trust does not fail and the trust property does not revert to the settlor
- 3) The Ct may modify or terminate the trust so that the trust property is applied or distributed in a manner consistent with the settlor's charitable purposes

- 4) A reversionary provision takes precedent over the *cy pres* doctrine only if the trust property goes to the settlor and the settlor is alive

§_701.0414

J. Uneconomic trusts

- 1) If trust property is under \$100,000 (or a revised applicable figure), trustee may terminate the trust if the trustee feels that the value of the trust property is insufficient to justify the cost of administration

§_701.0414(4)

- 2) The Ct may modify or terminate a trust or remove a trustee and appoint a different trustee if the value of the trust property is insufficient to justify the cost of administration even if the trust property has a total value in excess of the amount described in §_701.0414(2)

§_701.0415

K. Reformation to correct mistakes

- 1) If the settlor's intention and the terms of the trust were affected by a mistake of fact or law, the Ct may reform terms of a trust even if the terms are unambiguous
- 2) Clear and convincing evidence must be presented

§_701.0416

L. Modification or termination to achieve settlor's tax objectives

- 1) The Ct may modify the terms of a trust, or terminate the trust, to achieve a settlor's tax objectives so long as the modification or termination is not contrary to the settlor's probable intent
- 2) The modification or termination can be retroactive

§_701.0419

M. Transfers to trust

- 1) The order in which a will, trust, or appointing instrument is executed should be disregarded for the purpose of determining the validity of the transfer
- 2) Any transfer is governed by the terms of the trust, even if the trust was modified after the execution of the instrument of transfer, unless the instrument of transfer expressly provides otherwise
- 3) If a trust named in a will is no longer in existence at the time of the testator's death and the testator was a necessary party to the revocation or termination of the trust, the will provision shall be invalid. If the testator was not a necessary party to the revocation or termination, the provisions in the will shall be deemed to create a trust under the same terms as the trust instrument at the time of the execution of the will

N. Rules of construction

Uihlein v Uihlein

[11 Wis. 2d 219](#) (1960)

- 1) Ct must construe settlor's intent from the language of the instrument in light of surrounding circumstances
- 2) See [Sec. 5, Will Construction](#), in **PR 2**

§_701.0601

- 3) The capacity required to amend, revoke, or add property to a revocable trust is the same as that required to make a will

3. Creditors of Beneficiaries

§_701.0501

A. General rule

Absent a spendthrift provision, the Ct may order a creditor of a beneficiary be paid from present or future distributions

§_701.0502

B. Spendthrift provision

- 1) Terms of the trust must provide that the interest of the beneficiary is held subject to a spendthrift provision or words of similar import

- 2) The beneficiary cannot be the settlor unless it is a special needs trust for an individual with a disability
- 3) Prevents both the voluntary and involuntary transfer of a beneficiary's interest to a creditor

C. Exceptions to spendthrift provision

§_701.0503(1)

- 1) Child support—Ct may order payment if the beneficiary has right to receive distributions. If distributions are discretionary, the Ct may order payment when the distributions are made

§_701.0503(2)

- 2) Public support—Ct may order payment when beneficiary has right to receive distributions or when distributions are made if they are discretionary. If the spouse or minor child of the settlor, or the settlor is the beneficiary, the Ct may order payment even if distributions are discretionary. This does not apply to special needs trusts for an individual with a disability

§_701.0504

D. Discretionary trusts

- 1) A beneficiary's interest in a trust when distributions are subject to the discretion of the trustee is not an interest in property or an enforceable right and is free from the claims of creditors of a beneficiary
- 2) This applies even if beneficiary is serving as sole or co-trustee, there is a standard for making distribution, or there is abuse of discretion by the trustee
- 3) Exception to the above is when the beneficiary is acting as the sole trustee and the discretion to make distributions is not limited by an ascertainable standard or the consent of a party holding an adverse interest to the beneficiary

§_701.0505

4. Creditors of Settlers

A. During the lifetime of a settlor, the property of a revocable trust is subject to claims of creditors of the settlor

B. During the lifetime of a settlor, the Ct may order property in an irrevocable trust be paid to creditors of settlor if the trust instrument requires or authorizes the trustee to make payments to the settlor. This does not apply to special needs trusts for an individual with a disability

C. If the estate of a settlor is inadequate to satisfy claims, costs, expenses, and allowances in the estate, the Ct may order payment from a revocable trust of the settlor

5. Trustees

§_701.0702

A. Bond of trustee

- 1) The trustee shall post a bond to secure performance of its duties if the Ct finds that a bond is necessary to protect the interests of the beneficiaries OR is required by the terms of the trust and the Ct has not dispensed with the requirement
- 2) Bond cannot be required of a trust company or bank that is authorized to exercise trust powers and that has complied with §_220.09 or §_223.02

§_701.0706

B. Reasons for removal of trustee by Ct

- 1) Trustee has committed a material breach of trust
- 2) Lack of cooperation among co-trustees substantially impairs the administration of the trust
- 3) Trustee is unfit, unwilling, or persistently failed to administer the trust effectively
- 4) There has been a substantial change in circumstances or all the qualified beneficiaries request the removal of the trustee, the removal is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available

§_701.1001

C. Remedies for breach of trust—Ct may order the following if a trustee violates a duty the trustee owes to a beneficiary

- 1) Compel the trustee to perform the trustee's duties
- 2) Enjoin the trustee from committing a breach of trust
- 3) Compel the trustee to redress the breach by paying money, restoring property, or other means
- 4) Order trustee to account
- 5) Appoint an additional trustee, directing party, or trust protector
- 6) Suspend the trustee
- 7) Remove the trustee
- 8) Reduce or deny compensation
- 9) Void an act of a trustee, impose a lien or constructive trust on trust property, or trace trust property wrongfully disposed of and order the recovery of the property or proceeds

6. Custodial Trusts

A. Jurisdiction/Venue

§_54.986

- 1) Applies to transfer or declaration creating trust referring to §§_54.950–.988 if, at time of transfer or declaration, transferor, beneficiary, or trustee is resident of or has principal place of business in Wis or trust property located in Wis

Jurisdiction remains despite later change in residence or principal place of business or removal of trust property from Wis

- 2) Transfer made pursuant to law of another state governed by that law but may be enforced here

Provided law substantially similar

- 3) For venue, see [Sec. 3](#), **Jurisdiction and Venue**, in **GA 1**

B. Purpose

Statutory form of living trust for principal purpose of serving as guardianship substitute for incapacitated person

C. Creation of custodial trust

[§_54.984\(1\)\(a\)](#)

- 1) By written transfer of property to another person
 - a. Naming as beneficiary individual who may be transferor
 - b. In which transferee is custodial trustee

[§_54.984\(1\)\(b\)](#)

- 2) By written declaration describing property
 - a. Naming as beneficiary individual other than declarant
 - b. In which declarant as titleholder is custodial trustee

[§_54.954](#)

- 3) Recipient of property payable or transferable upon future event may designate custodial trustee for such property

[§_54.952\(3\)](#)

4) Title to custodial trust property is in custodial trustee and beneficial interest is in beneficiary

§_54.960

- a. Beneficial interest for multiple beneficiaries deemed separate custodial trusts of equal undivided interests for each beneficiary
- b. Unless creating document so provides, no right of survivorship except
 - That presumed as to spouse
 - That required as to marital property

§_54.956

5) Obligations of custodial trustee arise upon express or implied acceptance of custodial trust property

Form: See §_54.956(2)

§_54.952(6)

6) Any person may augment custodial trust property pursuant to §§_54.950–.988

§_54.958

D. Person who holds property or owes debt to incapacitated individual not having conservator or guardian of estate may transfer such property to adult member of beneficiary's family or trust company, as custodial trustee

- 1) For use and benefit of incapacitated person
- 2) Ct approval required if property or debt exceeds \$10,000

§_54.952(5)

E. Termination of custodial trust

- 1) Beneficiary, if not incapacitated, or conservator or guardian of estate of incapacitated beneficiary, may terminate by delivering signed written declaration terminating trust to trustee

- 2) Terminates upon death of beneficiary

[§_54.952\(4\)](#)

- 3) Transferor may not terminate custodial trust in any other way

[§_54.968\(6\)](#)

- 4) Incapacity of beneficiary does NOT terminate trust

[§_54.964](#)

F. General powers of custodial trustee

- 1) Trustee has all rights and powers over trust property that unmarried adult owner has over individually owned property, BUT may exercise them in fiduciary capacity only
- 2) Nevertheless, trustee liable for violations of general duties listed in [Sec. G.](#) below

[§_54.962](#)

G. General duties of custodial trustee

- 1) Register or record instrument vesting title, if appropriate
- 2) If beneficiary not incapacitated, follow directions of beneficiary in management, control, investment, or retention of custodial trust property

“Prudent person” standard governs unless trust document specifies otherwise or trustee has special skill or expertise

- 3) Take control of and collect, hold, manage, invest, and reinvest custodial trust property
- 4) Keep custodial trust property separate from other property
- 5) Keep records of all transactions involving trust property, including tax records, and keep them available for inspection by persons entitled

6) Duty/power to administer superior to those of DPA

§_54.978

H. Reporting and accounting duties of trustee

- 1) Upon acceptance of trust property, trustee to provide entitled persons with written statement describing property
- 2) Must provide written statement of administration of property
 - a. Once each year
 - b. Upon request of person entitled at reasonable times
 - c. Upon resignation or removal of trustee
 - d. Upon termination of trust
 - Upon termination of beneficiary's interest, person entitled to receive property must be provided current statement

McGuire v. McGuire

[2003 WI App 44](#)

[260 Wis. 2d 815](#)

- 3) Person entitled, including successor trustee, may petition Ct for accounting

§_54.978(4)

- 4) In action or proceeding under §§_54.850–.988, Ct may require or permit trustee to account

Trustee may petition Ct for approval of final accounts

§_54.978(5)

- 5) Ct must require removed trustee to account and deliver trust property and records to successor and to execute all instruments necessary for transfer of trust property

§_54.978(6)

- 6) On petition of entitled person, Ct may, upon proper notice, issue instructions to trustee or review propriety of compensation to trustee

§_54.976

I. Expenses, compensation, and bond

- 1) Trustee entitled to reimbursement from trust property for reasonable compensation and expenses incurred in performance of fiduciary duties
 - a. As to compensation, trustee must elect to charge no later than 6 months after end of calendar year for which fiduciary services performed
 - b. Bond not required

§_54.966

J. Use of custodial trust property

- 1) Trustee must pay to beneficiary or expend for beneficiary's use and benefit so much or all of trust property as beneficiary while not incapacitated may direct from time to time
- 2) Trustee must expend so much or all of trust property as trustee considers advisable for use and benefit of incapacitated beneficiary and individuals supported or legally entitled to support by such beneficiary at time incapacitation determined

Ct order not required

- 3) Trustee may establish accounts against which trustee or beneficiary may withdraw funds

Funds withdrawn by beneficiary are distributions of trust property by trustee

§_54.968

K. Determination of incapacity; effect

- 1) Trustee must administer trust for incapacitated beneficiary if any of following apply
 - a. Trust created under [§_54.958](#)
 - b. Creating instrument so directs
 - c. Trustee determines beneficiary incapacitated
- 2) In making determination, trustee may rely on any of following
 - a. Directions/authority (including pursuant to DPA) from beneficiary before incapacitation
 - b. Certificate from beneficiary's physician
 - c. Other persuasive evidence
- 3) Trustee concluding incapacity ceased may administer trust as if beneficiary not incapacitated

[§_54.974](#)**L. Declination, resignation, incapacity, death, or removal**

- 1) Before accepting the property, trustee may decline to serve by notifying person making designation. If transfer has not occurred, designated substitute or another designated by transferor may serve

In other cases, transferor may designate substitute

[§_54.974\(2\)](#)

2) Trustee who has accepted property may resign by doing ALL the following

a. Delivering written notice

- To successor, if any,
- To beneficiary
- To beneficiary's guardian or conservator, if any, if beneficiary incapacitated

b. Transferring, registering, or recording appropriate instrument relating to trust property in name of successor

§_54.974(5)

c. Delivering records to successor as soon as practicable

- Successor may enforce this obligation

§_54.974(3)

3) If trustee or successor ineligible, resigns, dies, or becomes incapacitated, successor designated under §_54.952(7) or §_54.954 becomes trustee

a. If no effective provision for successor, then beneficiary (if not incapacitated) may designate

b. If beneficiary incapacitated or fails to act within 90 days, then conservator or guardian becomes trustee

§_54.974(4)

4) If successor not designated as above, Ct may appoint, upon petition of eligible person

§_54.974(6)

5) Eligible person may petition Ct to remove trustee for cause and to appoint successor, or to furnish bond or other security, or for other appropriate relief

§_54.982

M. Distribution on termination

- 1) Upon termination of trust by beneficiary, conservator, or guardian, trustee must transfer unexpended property as follows
 - a. To beneficiary, if not incapacitated or deceased
 - b. To conservator, guardian of estate, or other recipient designated by Ct for an incapacitated beneficiary
- 2) Upon death of beneficiary, trustee must distribute unexpended property as follows
 - a. As last directed in writing signed by deceased while not incapacitated and received by trustee during life of beneficiary
 - b. To survivor of multiple beneficiaries if survivorship provided pursuant to [§_54.960](#)
 - c. As designated in instrument creating trust
 - d. To estate of deceased beneficiary
- 3) If, when custodial trust would otherwise terminate, distributee is incapacitated, trust continues for use and benefit of distributee until incapacity removed or trust otherwise terminated
- 4) Death of beneficiary does not terminate trustee's power to discharge obligations of trustee or beneficiary before termination of trust

[§_54.980](#)

N. Limitation of action against trustee

- 1) Claim against trustee for accounting or breach of duty barred as to beneficiary, person to whom property to be delivered, or representative if

a. Final account or statement fully disclosing matter received

- Unless action or proceeding to assert claim commenced within 2 years after receipt of final account or statement

b. Three years after termination if [para. a.](#) above does not apply

c. Five years after termination if claim against trustee founded on fraud, misrepresentation, or concealment related to final settlement or concealment of trust's existence

2) Claim for relief by certain claimants not barred except as follows

a. Minor, until earlier of 2 years after becomes adult or dies

b. Incapacitated adult, until earliest of 2 years

- After appointment of conservator
- Removal of incapacity, or
- Death

c. Adult not incapacitated, now deceased, until 2 years after death

[§_54.970](#)

O. Third-party liability

- 1) Third party in good faith and without Ct order may act on instructions of, or otherwise deal with, person purporting to act as trustee

2) In absence of knowledge, third party not responsible for determining

§ 54.970(1)

a. Validity of trustee's designation

§ 54.970(2)

b. Propriety of, or authority under the law, for any of trustee's actions

§ 54.970(3)

c. Validity or propriety of instrument executed or instructions given pursuant to law either by person purporting to make transfer or declaration or by purported trustee

§ 54.970(4)

d. Propriety of application of property vested in purported trustee

§ 54.972

3) Third party may sue trust/trustee on any contract entered into by trustee in fiduciary capacity, or on obligation arising from ownership or control of trust property or tort committed in course of administering trust

a. Trustee not personally liable to third party in any of following situation

- On contract properly entered into in fiduciary capacity unless trustee fails to reveal that capacity or to identify trust in contract
- For obligations arising from control of property or for tort committed in course of administration of trust unless trustee personally at fault

b. Beneficiary not personally liable to third party for obligation arising from beneficial ownership of property for tort committed in course of administration of trust

- Unless beneficiary personally in possession of property giving rise to liability or personally at fault
- c. Liability under [paras. a.](#) and [b.](#) above does not apply to extent person sued is covered by liability insurance

PR 10: POWERS AND DUTIES OF TRUSTEES

1. Trustee Takes Legal Title to Trust Property

[§_701.0710](#)
[§§_701.0801–.0819](#)

A. .Settlor may transfer property to trust by placing legal title of property in name of trustee or in the name of the trust itself. Trustee holds subject to fiduciary duties

B. See [Ch 854](#) for general rules regarding transfers at death

[§_701.1204](#)

Rules apply to transfers at death under trust instruments

2. Appointment and Supervision of Trustee

A. Inter vivos trustees

Davis v Smith
(Est of Deibig)
[49 Wis. 2d 237](#) (1970)

1) Ct does not supervise trustee of living trust

Under prior version of Wis trust statutes, Wis Supreme Ct suggested supervision of trustee of living trust

2) See [§_54.978](#) duty of custodial trustee to beneficiary

§_701.0201–.0206

- 3) For Circuit Ct procedures in trust proceedings see [PR 9, Sec. 1](#)

§_856.29, §_865.08(6)

B. Testamentary trustees

- 1) Ct shall appoint, unless the Ct otherwise directs

- a. Trustee named in will

§_223.12

- b. Foreign trustee, to administer local property for foreign trust

[Ch](#) 878

- 2) Bond

Before issuance of letters, Ct may require bond

§_701.0702(3)

- 3) No bond required for

- a. Trust company bank, state bank, or national bank, if authorized to exercise trust power and if in compliance with §_220.09 or §_223.02
- b. Religious, charitable, or educational corporation or society
- c. Foreign corporation

Newcomb v Ingram

[211 Wis. 88](#) (1932)

- 4) Surety of executor remains liable until discharge notwithstanding same person's bond as trustee approved

§_856.29

Old Rep Sur Co v Erlien

(In re Est of Erlien)

[190 Wis. 2d 400](#)

(Ct. App. 1994)

Surety of testamentary trust may be liable if trustee fails to ensure that personal representative has transferred all property to trust

[§_701.0801–.0807,](#)
[§_701.0809–.0813](#)

3. Duties of Trustee

(For duties of Custodial Trustees, see [PR 9, Secs. 6.G. & 6.H.](#))

A. Duties of testamentary trustee

[§_701.0801](#)

- 1) Duty to administer the trust

[§_701.0802](#)

- 2) Duty of loyalty

[§_701.0803](#)

- 3) Duty of impartiality

[§_701.0804](#)

- 4) Duty to act prudently

[§_701.0805](#)

- 5) Duty to incur only reasonable costs

[§_701.0806](#)

- 6) Duty to use special skills

[§_701.0807](#)

- 7) Duty to properly delegate

[§_701.0809](#)

- 8) Duty to control and protect trust property

[§_701.0810](#)

- 9) Duty of recordkeeping and identification of trust property

[§_701.0811](#)

- 10) Duty to enforce and defend claims

[§_701.0812](#)

11) Duty to collect trust property from former trustee or other persons

§_701.0813

12) Duty to inform and report

B. Discharge of testamentary trustee

§_71.13(2), (3)

1) Certificate of compliance with tax laws required but Ct may dispense with requirement

§_701.0708

2) Compensation

- a. If trust terms do not specify compensation, trustee is entitled to compensation that is “reasonable under the circumstances”
- b. If trust terms do specify compensation, trustee is entitled to be compensated as specified, but Ct may allow more or less compensation if either of the following applies:
 - Trustee’s duties are substantially different from those contemplated when trust created, or
 - Specified compensation would be unreasonably low or high
- c. If trustee has rendered other services in connection with administration of trust, then trustee may also receive reasonable compensation for those services

4. Powers of Trustee

§_701.0815

A. General powers

1) Powers conferred by terms of trust

2) Except as limited by terms of trust,

- a. All powers over trust property that an unmarried, competent owner has over individually owned property
- b. Any other powers appropriate to achieve the proper investment, management, and distribution of trust property
- c. Other powers conferred by [Ch 701](#)

[§_701.0815\(3\)](#)

- 3) A trustee has no power to give warranties in a sale, mortgage, or lease that are binding on the trustee personally

B. Specific powers

[§_701.0816](#)

- 1) [Sec. 701.0816](#) lists 30 specific powers that trustee has unless the terms of the trust prohibit them. These include powers to do the following:

[§_701.0816\(12\)](#)

- a. Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration

[§_701.0816\(17\)](#)

- b. Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee

[§_701.0816\(18\)](#)

- c. Make loans out of trust property, including loans to a beneficiary, on terms and conditions the trustee considers to be fair and reasonable under the circumstances; trustee has a lien on future distributions for repayment of these loans

[§_701.0816\(19\)](#)

- d. Pledge trust property to guarantee loans made by others to a beneficiary

[§_701.0816\(21\)](#)

- e. Pay an amount distributable to a beneficiary who is under a legal disability by paying it directly to the beneficiary or applying it for the beneficiary's benefit by paying it to specified individuals or managing it on beneficiary's behalf

[§_701.0816\(27\)](#)

- f. Create or fund a plan under [IRC](#) § 529 or other college savings vehicle for a beneficiary's benefit

C. Allocation of funds

[§_701.1103](#)

- 1) Trustee to allocate expenses and receipts with respect to interests of beneficiaries as follows
 - a. According to specific provisions of trust agreement, or if trust agreement provides discretionary powers of administration, in trustee's discretion
 - b. According to [§§_701.1101–.1136](#), which generally provide that a trustee shall add a receipt or charge a disbursement to principal

Brite v Heggstad
(Will of Clarenbach)
[23 Wis. 2d 71](#) (1964)

- c. Trustees under will who were also life beneficiaries abused discretion allowed by will by allocating capital gain to themselves

2) Charges against income

[§_701.1130\(1\)](#)

- a. One-half trustee's regular compensation

[§_701.1130\(3\)](#)

- b. Ordinary expenses of administration

[§_701.1134\(1\)](#)

- c. Taxes on receipts as income
- d. Repayment to principal as set forth in [§_701.1133](#)

3) Charges against principal

[§_701.1131](#)

- a. One-half of trustee's regular compensation and all of special compensation of trustee

- b. Fees and expenses regarding principal
- c. Extraordinary expenses/repairs, including environmental matters

§_701.1134

- d. Tax allocated to principal
- e. Certain insurance premiums, other than those described in §_701.1130(4)

§_701.1131(2)

- f. Repayment of income paid to creditor of encumbered asset to extent it resulted in a reduction of principal balance of debt

§_701.1136

- 4) In absence of other provision, income should be paid out at least annually

§_701.0417(4)

Morkin v Clancy
(*Est of Naulin*)

[56 Wis. 2d 100](#) (1972)

- 5) Valuation of assets for distribution is current market value at time of distribution

5. Resignation and Removal of Trustee

§_701.0705

A. Trustee may resign

- 1) Upon giving at least 30 days' notice to qualified beneficiaries, settlor (if living), co-trustee(s), trust protector(s), and each directing party, or
- 2) With approval of Ct

§_701.0706

B. Trustee may be removed

- 1) At request of settlor, co-trustee, or qualified beneficiary, or on Ct's on initiative, if any of the following applies:
 - a. Trustee has committed material breach of trust
 - b. Lack of cooperation among co-trustees substantially impairs administration of trust
 - c. Removal of the trustee is appropriate because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively
 - d. There has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the removal is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available

§_701.0704

C. Successor trustee

- 1) Vacancy in trusteeship exists if any of the following occurs:
 - a. Designated trustee declines trusteeship
 - b. Designated trustee cannot be identified or does not exist
 - c. Trustee resigns
 - d. Trustee is disqualified or removed
 - e. Trustee dies
 - f. Guardian or conservator is appointed for trustee
 - g. Any other event occurs resulting in no person acting as trustee

- 2) Vacancy must be filled if trust has no remaining trustee
- 3) If trusteeship must be filled, the following order of priority must be used:
 - a. Person designated in the terms of the trust to act as a successor trustee
 - b. Person appointed by unanimous agreement of qualified beneficiaries, except in specified cases of trust for individual with disability
 - c. Person appointed by Ct

GA 1: GUARDIANSHIP

NOTE:

Under [Chapter](#) 54, incompetent persons are subject to guardianships of the person or the estate. Minors are subject to only guardianships of the estate under [Chapter](#) 54 but are subject to guardianships of the person under [Chapter](#) 48. *See* 2019 Wis. Act 109; *see also Juvenile Benchbook JV 16* (minor guardianships of the person).

1. Timelines for Guardianship and Protective Placement and Protective Services Cases

Type of Proceeding	Statute	Time Periods
Temporary Guardianship	§ 54.50(3)(c)	Hearing on Petition no earlier than <u>48 hours</u> after filing petition unless good cause is shown
	§ 54.50(3)(b)	GAL must meet with ward before hearing if possible and no later than <u>7 days</u> after hearing
	§ 54.50(3)(d)	If requested, rehearing on appointment of temporary guardian within <u>10 calendar days</u> after request
	§ 54.50(2)	Appointment may last for <u>60 days</u> , with a possible <u>60-day extension</u> for good cause
	§ 51.20(7)(d)	Under Ch. 51 , Ct may appoint temporary guardian immediately after hearing for <u>up to 30 days</u> , if Ct finds probable cause that person is fit subject for guardianship and protective placement or services
	§ 54.50(2)	No further temporary guardianship for <u>at least 90 days</u> after expiration of term (including any extension)

Guardianship	§_54.38(2)(a) §_54.44(1)(a) §_55.10(1) §_54.44(1)(b) §_50.06 §_54.44(1)(a) §_54.44(6)	Service of Petition <u>10 business days</u> * before hearing Hearing on Petition within <u>90 days</u> after filing If Petition for Protective Placement is also filed or if individual has been admitted to a nursing home or CBRF under §_50.06 , then petition must be heard within <u>60 days</u> after filing Doctor's report provided by petitioner to parties and GAL <u>96 hours</u> before hearing If proposed guardian is unsuitable , <u>30 days</u> to hold another hearing to appoint a suitable guardian
Foreign Guardianship	§_53.32(2) §_54.38(2) §_54.44(1)(c) §_53.32(6)	Notice of Petition to accept foreign guardianship must be given in same manner as notice is required in Wis Hearing on Petition within <u>90 days</u> after filing if a hearing is requested Modification to conform foreign guardianship with Wis law within <u>60 days</u> after issuance of final order accepting transfer of guardianship
Review of Conduct of Guardian	§_54.68(3)	Hearing within <u>10–60 days</u> after filing of petition for review of the conduct of a guardian

* See [Sec. 801.15\(1\)\(b\)](#).

Type of Proceeding	Statute	Time Periods
Protective Placement or Services	§_55.10(1) §_54.34(2) §_55.09 §_55.11(3)	Hearing on petition must be held within <u>60 days</u> after filing, but Ct can grant up to <u>45-day extension</u> Petition for guardianship may be filed concurrently (if not already in place) Notice of petition must be served at least <u>10 business days</u> * before hearing Comprehensive evaluation to parties <u>96 hours</u> before hearing
Emergency Protective Placement	§_55.135(4) §_55.135(5)	Probable cause hearing within <u>72 hours</u> after detention (excluding Saturdays, Sundays, and legal holidays) Final hearing within <u>30 days</u> if probable cause is found
Emergency Protective Services	§_55.13(2) §_55.13(3)	Probable cause hearing within <u>72 hours</u> after commencement of services (excluding Saturdays, Sundays, and legal holidays) Final hearing within <u>60 days</u> if probable cause is found
Transfers Between Placements	§_55.15(5)(a) §_55.15(5)(b) §_55.15(6), (7)	Nonemergency transfer requires <u>10 days'</u> notice by person or entity initiating transfer to Ct and to all other persons or entities who could initiate the transfer but did not do so Emergency transfer requires (1) <u>immediate notice</u> upon transfer to all other persons or entities who could initiate transfer but did not do so, and (2) notice to the Ct within <u>48 hours</u> after transfer Hearing on petition objecting to transfer must be held within <u>10 days</u> after a petition is filed

Temporary Protective Placement or Services	§ 51.67	If Ch. 51 commitment not warranted , then <u>immediately</u> after hearing under § 51.13(4) or § 51.20 , Ct may appoint temporary guardian and order temporary protective placement or services under Ch. 55 for <u>up to 30 days</u> , if Ct finds that person is fit subject for guardianship and protective placement or services. Any interested party can then file a petition for permanent guardianship or protective placement or services, including medication, under Ch. 55 .
Annual (<i>Watts</i>) Review of Protective Placement	§ 55.18(1) § 55.18(2)	Agency/Cty Dept must file report with Ct by <u>1st day of 11th month</u> after initial protective placement order (and every year thereafter) GAL is appointed after Cty Dept files report. GAL's written report must be filed within <u>30 days</u> after appointment

* See [Sec. 801.15\(1\)\(b\)](#).

Tina B v Richard H
(*In re Gdnship of Elizabeth MH*),
[2014 WI App 123](#)
[359 Wis. 2d 204](#)
St ex rel Sandra D v Getto
(*Gdnship of Sandra D*)
[175 Wis. 2d 490](#)
(Ct. App. 1993)

NOTE: See additional time-related discussions in [GA 2, Sec. 7.A.2](#)), and [GA 3, Sec. 3.D.5\)b](#).

[§ 54.01](#)

2. Definitions

[§ 54.01\(14\)](#)

A. Impairment—developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities

[§ 54.01\(8\)](#); *see also*

[§ 51.01\(5\)\(a\)](#)

B. Developmental disability—disability

- 1) Attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for an intellectual disability
- 2) Which has continued or can be expected to continue indefinitely
- 3) Substantially impairs an individual from adequately providing for own care or custody
- 4) Constitutes a substantial handicap to the afflicted individual

§_54.01(6); *see also*

§_55.01(1v)

- 5) Does NOT include dementia that is primarily caused by degenerative brain disorder

§_51.01(14t)

§_54.01(30)

C. Serious and persistent mental illness—mental illness that

- 1) Is severe in degree and persistent in duration
- 2) Causes a substantially diminished level of functioning in primary aspects of daily living and inability to cope with ordinary demands of life
- 3) May lead to inability to maintain stable adjustment and independent functioning without long-term treatment and support
- 4) May be of lifelong duration
- 5) Includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does NOT include
 - a. Degenerative brain disorder, or
 - b. Primary diagnosis of developmental disability or of alcohol or drug dependence

§_54.01(6)

§_51.01(4r)

see also §_55.01(1v)

D. Degenerative brain disorder

Loss or dysfunction of brain cells that substantially impairs ability to “provide adequately” for one’s own care or custody or to “manage adequately” one’s property or financial affairs

§_54.01(22)

E. Other like incapacities—means those conditions

- 1) Incurred at any age that are the result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and

- 2) That produce a condition that substantially impairs an individual from providing for own care or custody

§_54.01(10)

F. Guardian—One appointed by a Ct under §_54.10 to

- 1) Manage income and assets, which may include by Ct order digital property as defined in §_711.03(10), and
- 2) Provide for the essential requirements for health and safety and the personal needs of an individual found incompetent or a spendthrift or to manage the income and assets of a minor

§_54.01(11)

G. Guardian of the estate—one appointed to comply with the duties specified in §_54.19 and exercise any of the powers specified in §_54.20

§_54.01(12)

H. Guardian of the person—one appointed to comply with the duties specified §_54.25(1) and to exercise any of the powers specified in §_54.25(2)

§_54.01(15)

I. Incapacity—inability of an individual effectively to receive and evaluate information or to make or communicate a decision with respect to the exercise of a right or power

§_54.01(16)

§_54.10(3)(a)

J. Individual found incompetent—an individual adjudicated by a Ct as meeting the requirements of §_54.10(3) found by clear and convincing evidence that all of the following are true:

- 1) At least 17 years and 9 months of age
- 2) For purposes of appointment of guardian of the person, because of impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet essential requirements for own physical health and safety
- 3) For purposes of appointment of guardian of the estate because of impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of individual's property or financial affairs, to the extent that any of the following applies:

- a. Individual has property that will be dissipated in whole or in part
 - b. Individual is unable to provide for own support
 - c. Individual is unable to prevent financial exploitation
- 4) Individual's need for assistance in decision-making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, supported decision-making agreement under [Ch 52](#), or other means that individual will accept

[§_54.01\(20\)](#)

[§_54.10\(3\)\(a\)1.](#)

K. Minor—an individual who has not attained the age of 18 years, except permanent guardians may be appointed for an individual who is found incompetent and is at least 17 years and 9 months of age

[§_48.9795](#)

2019 Wis. Act 109

Guardianships of the minor person are no longer subject to [Ch 54](#), but instead [Ch 48](#). Guardianships of the minor estate remain subject to [Ch 54](#)

[§_54.01\(31\)](#)

L. Spendthrift—a person who, because of the use of alcohol or other drugs or because of gambling or other wasteful course of conduct

- 1) Is “unable to manage effectively his or her financial affairs,” or
- 2) Is “likely to affect the health, life, or property of himself, herself, or others so as to endanger his or her support and the support of his or her dependents, if any, or expose the public to responsibility for his or her support”

3. Jurisdiction and Venue

A. Persons and estates subject to guardianship

[§_54.10\(1\), \(3\)](#)

- 1) Under [Ch 54](#), incompetent persons are subject to guardianships of the person or the estate; under [Ch 54](#), minors are subject only to guardianships of the estate. (Minors are subject to guardianships of the person under [Ch 48](#))

[§_54.10\(4\)](#)

Ct may appoint separate guardians for person and estate

[§_54.10\(2\)](#)

2) Spendthrifts are subject to guardianships of the estate

B. Venue

§_54.30(2)

§_51.40(2)

1) For Wis residents, Cty of proposed ward's residence or Cty in which proposed ward physically present

§_54.30(2)

2) For nonresidents, Cty where person or property of proposed ward may be found, or where guardian proposes that ward reside

§_53.23

3) Jurisdiction needs to be addressed for persons that are not in their home state or do not have a home state

§_54.30(3)

*Grant Cty Dept of
Soc Servs v Unified Bd
(Gdnship of Jane EP)*

[2005 WI 106](#)

[283 Wis. 2d 258](#)

4) For nonresidents already subject to foreign order, comity concerns must be addressed

5) Guardian of estate may be appointed in any Cty where part of proposed ward's estate located

6) Guardian of person may be appointed in Cty where proposed ward found in extraordinary circumstances requiring medical aid or prevention of harm to proposed ward's person or property. *See infra* [Sec. 6](#) (**Temporary Guardianship**)

§_54.30(3)

C. Change of venue

§_54.30(3)(a)

1) Ct where petition first filed determines venue

§_54.30(3)(a), (b)

- a. If Ct determines venue lies in another Cty, entire record certified to proper Ct (but notice of proposed transfer of venue required to Corp Counsel, of Counties of original venue and proposed transfer, and to register in probate, of Cty of proposed transfer, who have 15 days to object)

§_54.30(3)(a)

- b. If Ct determines earlier petition filed elsewhere, Ct must summarily dismiss subsequent petition

§_54.30(3)(b)

2) If ward changes residence from one Cty to another within State, Ct may transfer venue to ward's new Cty of residence

4. Guardianship Petitions

A. Standing

§_54.34(1)

See §_54.01(17) (defining
interested person)

May be filed by “any person” (subject to [Ch 53](#)—see [Sec. 5](#), *infra*)

§_54.34(1)

B. Contents of petition

- 1) Name, date of birth, residence, and post-office address of proposed ward and, if the proposed ward is a minor, whether the minor has been adopted
- 2) Specific nature of proposed ward’s alleged incapacity or spendthrift habits
- 3) Approximate value of proposed ward’s property and general description of its nature
- 4) Any assets of the proposed ward previously derived from or benefits of the proposed ward now due and payable from US Dept of Veterans Affairs (USDVA)
- 5) Any other claim, income, compensation, pension, insurance, or allowance to which proposed ward may be entitled
- 6) Whether proposed ward has any guardian presently
- 7) Name and post-office address of any person nominated as guardian by petitioner
- 8) Names and post-office addresses of all interested parties
- 9) Name and post-office address of person or institution, if any, that has care and custody of proposed ward or the facility, if any, that is providing care to the proposed ward

- 10) Interest of petitioner and, if a public official is the petitioner, authority of petitioner to act
- 11) Whether proposed ward is a recipient of a public benefit
- 12) Agent under any current, valid power of attorney for health care (PAHC) or durable power of Atty (DPA) that proposed ward has executed
- 13) Whether petitioner is requesting a full or limited guardianship and, if limited, specific authority sought by petitioner for guardian or specific rights of individual that petitioner seeks to have removed or transferred
- 14) Whether proposed ward, if married, has children who are not children of the current marriage
- 15) Whether petitioner is aware of any guardianship or conservatorship or related pending or ordered proceeding involving the proposed ward in another state or Cty and, if so, details of guardianship, conservatorship, or related proceedings

Recommendation

- 16) Include name and address of nominated standby and successor guardian to avoid second guardianship petition

Amy Z v Jon T
(In re Gdnship of
Carly AT)
[2004 WI App 73](#)
[272 Wis. 2d 662](#)

- 17) If child support is sought, then request for child support should be included in guardianship petition or otherwise specifically noticed

§_54.38(1)

- 18) Failure to notify all interested persons is jurisdictional unless waived by non-served interested person

§_54.01(17)(a)

C. “Interested person” for purposes of petition for guardianship means:

- 1) Proposed ward, if 14 years or older;
- 2) Spouse or adult child of proposed ward;

3) Parent of a proposed ward who is a minor;

[§ 54.01\(17\)](#)

4) Heir, as defined in [§ 851.09](#), who can be reasonably ascertained with due diligence, if no spouse, child, or parent;

5) Nominated guardian;

6) Guardian or other fiduciary appointed by Ct of any State;

7) Trustee for a trust established by or for proposed ward;

8) Agent under PAHC;

[Ch 244](#)

9) Agent under DPA;

10) If proposed ward is a minor, the person exercising principal responsibility for care and custody during last 60 days before filing of petition;

11) If proposed ward is a minor and has no living parent, anyone nominated as fiduciary in will or other written instrument;

12) If proposed ward is receiving moneys paid, or if moneys are payable, by USDVA, a representative of USDVA;

13) If proposed ward is receiving moneys paid, or if moneys are payable, by state Dept of Veterans Affairs (VA), a representative of the state VA;

14) If proposed ward is receiving long-term support or similar public benefits, Cty Dept of human/social services;

15) Corp Counsel of Cty in which petition is filed and Cty where proposed ward resides;

16) Any other person required by Ct

[§_54.01\(17\)\(b\)](#)

D. “Interested person,” for purposes of proceedings subsequent to order for guardianship, means:

- 1) Guardian;
- 2) Spouse or adult child of ward or parent of minor child;
- 3) Cty of venue, through the Cty’s Corp Counsel, if Cty has an interest;
- 4) Agent under DPA unless revoked or terminated by Ct;
- 5) Any other individual required by Ct

[§_54.34\(2\)](#)

E. Petition may include application for protective placement or services or both under [Ch.55](#)

[§_54.34\(2m\)](#)

[§_55.055\(2\)\(b\)](#)

Agnes T v Milw Cty

(In re Gdnship

of Agnes T)

[179 Wis. 2d 363](#)

(Ct. App. 1993)

aff’d [189 Wis. 2d 520](#)

(1995)

- 1) Petition, if filed on ground of incompetency, must include protective placement request if proposed ward is in nursing home of 16 beds or more

[§_55.14\(2\)](#)

- 2) Petition must include protective services request if involuntary administration of psychotropic medications is requested

[§_55.14\(3\)](#)

F. Additional requirements of petition if alleged that person not competent to refuse psychotropic medication

1) Petition to allege all of following are true

- a. Physician has prescribed psychotropic medication for the individual
- b. Individual is not competent to refuse psychotropic medication
- c. One of the following is true:
 - Individual has refused to take the psychotropic medication voluntarily. If this is alleged, petition shall identify, if known, reasons individual refuses to take psychotropic medication voluntarily and shall provide evidence showing that reasonable number of documented attempts to administer psychotropic medication voluntarily using appropriate interventions that could reasonably be expected to increase individual's willingness to take psychotropic medication voluntarily have been made and have been unsuccessful
 - Attempting to administer psychotropic medications to individual voluntarily is not feasible or is not in individual's best interests. If this is alleged, petition must identify specific reasons supporting that allegation
- d. Individual's condition for which psychotropic medication has been prescribed is likely to be improved by administration of psychotropic medication and individual is likely to respond positively to psychotropic medication
- e. Unless psychotropic medication is administered involuntarily, individual will incur substantial probability of physical harm, impairment, injury, or debilitation, or will present substantial probability of physical harm to others. Substantial probability of physical harm, impairment, injury, or debilitation shall be evidenced by one of the following:
 - Individual's history of at least 2 episodes, 1 of which has occurred within previous 24 months, that indicate pattern of overt activity, attempts, threats to act, or omissions that resulted from individual's failure to participate in treatment, including psychotropic medication, and that resulted in finding of probable cause for commitment under [§_51.20\(7\)](#), settlement agreement approved by Ct under [§_51.20\(8\)](#) (bg), or commitment ordered under [§_51.20\(13\)](#)
 - Evidence that individual meets one of the dangerousness criteria set forth in [§_51.20\(1\)\(a\)2.a.–e.](#)

§_55.14(4)

- 2) Petition under §_55.14 must include written statement signed by physician who has personal knowledge of the individual that provides general clinical information regarding appropriate use of psychotropic medication for individual's condition and specific data that indicates that individual's current condition necessitates use of psychotropic medication

§_55.14(7)

- 3) Upon the filing of petition under §_55.14, Ct shall make referral for appointment of legal counsel, as provided under §_55.105

G. Petition may be for incompetency to vote

§_6.03(3)

§_54.25(2)(c)1.g.

- 1) Elector of municipality may petition for determination that resident of municipality incapable of understanding objective of elective process and thereby ineligible to register or vote

§_6.03(1)(a)

- 2) Ct to make limited finding on voting eligibility

§_54.25(2)(c)1.g.

Person incapable of understanding objective of elective process

- 3) If Ct finds person ineligible to vote only, appointment of guardian or limited guardian NOT required

§_54.25(2)(c)4.

Determination of Ct communicated in writing by clerk of Ct to election official or agency responsible for determining challenges to registration and voting

5. Foreign Guardianships

§_53.32(1)

A. Guardian must petition Wis Ct to accept foreign guardianship

- 1) Petition must include:
 - a. Certified copy of other state's provisional order of transfer

- b. Proposed order specifying powers to be granted in Wis
- c. Sworn statement that, to best of petitioner's knowledge, proposed order is consistent with authority granted to guardian in the other state

§_54.34(3)

NOTE: If petition for receipt and acceptance of foreign guardianship, additional information may be included.

§_53.32(2)

2) Notice

- a. Must be given to persons entitled to notice if petition were for appointment of guardian in both transferring state and Wis
- b. Must be given in same manner as notice is required to be given in Wis

§_53.32(3)

B. Ct must hold hearing on own motion or if requested by guardian, ward, or other notified person

§_53.32(4)

C. Ct must issue order provisionally granting petition unless

- 1) Objection is made and objecting party establishes that transfer would be contrary to ward's interests or that guardian's proposed powers significantly expand powers granted in other state
- 2) Guardian is ineligible for appointment in Wis

§_53.32(5)

D. Wis Ct must issue final order upon receipt from transferring Ct of final order issued under provisions similar to §_53.31 transferring proceeding to Wis

§_54.50

6. Temporary Guardianship

A. Upon petition, Ct may appoint temporary guardian if situation of spendthrift or incompetent person or their dependents requires immediate appointment of guardian of estate, person, or both, or if the minor requires immediate appointment of a guardian of the estate

§_54.50(3)(b)

- 1) GAL must be appointed as soon as possible, who shall attempt to meet with ward before hearing but no later than 7 days after hearing

§_54.50(3)(c)

- 2) Standard for determining whether proposed ward is incompetent is reasonable likelihood

§_54.50(3)(c)

- 3) Petitioner must provide report or testimony of physician or psychologist at hearing

§_54.50(3)(a)

- 4) Petition for temporary guardianship must be accompanied by petition for permanent guardianship or state why one is not being sought

B. Notice

§_54.38(6)

- 1) Petition must be served on proposed ward before or at time of filing of petition, or as soon thereafter as possible, but not later than 3 days after hearing

§_54.50(3)(c)

Must hold hearing on petition no earlier than 48 hours after filing, absent good cause

§_54.38(6)

- 2) Must include notice of

- a. Right to counsel

§_54.50(3)(d)

- b. Right to move for reconsideration or modification at any time and, if rehearing requested, must be held within 10 days after request

§_54.50(2)

C. Duration of temporary guardianship

- 1) For up to 60 days
- 2) May be extended for 60 days if done before original term expires

- a. Only 1 extension permitted
- b. No other petition for temporary guardianship may be granted for 90 days after expiration

§_54.50(2)

D. Guardian's powers specifically limited to performance of particular acts in order of appointment

- 1) EXCEPT temporary guardian may not sell real estate or expend an amount in excess of \$2,000 without Ct order and giving bond
- 2) Temporary guardian of estate must account to Ct
 - a. At intervals Ct prescribes, and

§_54.50(4)

- b. Upon termination of temporary guardianship

Recommendation

- c. Appointment order should specifically require temporary guardian to file an accounting and other reports as required

§_54.50(4)

E. Termination of temporary guardianship

- 1) Term of temporary guardian ends

§_54.50(2)

- a. Upon expiration of 60 days, or expiration of single 60-day extension. *See supra* [Sec. C.](#)

§_54.50(4)

- b. Upon issuance of letters of permanent guardianship

§_54.50(4)

- c. Upon judicial determination that situation of ward that was basis for temporary guardianship ended

d. Upon completion of act for which temporary guardian appointed

§_54.50(4), §_54.66(1), (3)

2) Accounting required of temporary guardian of estate

§_54.66(3)

a. Ct may discharge temporary guardian and release bond

- On approval of account
- On filing of receipts showing proper distribution

§_54.50(4)

b. Temporary guardian must turn over to appropriate parties all of ward's estate over which temporary guardian has control

§_54.50(4)

3) Ct-ordered reports must be filed by temporary guardian of person

§_54.50(4)

4) Any action commenced by temporary guardian may be prosecuted to final judgment by successor in interest, if any

7. Guardianship of Estate—Filing Fee

§_54.60(5)

A. If petition is for guardianship of estate, appropriate fee must be paid when inventory filed

See §_814.66(1) for fee schedule

§_54.12

8. Exceptions to Appointment of Guardian

A. Small estates

- 1) If minor or individual found incompetent, except for individual's incapacity, is entitled to possess assets valued at amount specified in [§_867.03\(1g\)](#) or less, any Ct in which action or proceeding involving assets is pending may, without requiring appointment of guardian, order that register in probate do one of the following:
 - a. Deposit property in interest-bearing account in bank or other financial institution insured by agency of federal government or invest property in interest-bearing obligations of US. Fee for services of register in probate in depositing and disbursing the funds under [§_54.12\(1\)\(a\)](#) is prescribed in [§_814.66\(1\)\(n\)](#)
 - b. Make payment to minor's parent or to person having actual custody of minor
 - c. Make payment to minor
 - d. Make payment to person having actual or legal custody of incompetent person or to person providing for care and maintenance of individual found incompetent for benefit of individual found incompetent
 - e. Make payment to agent under DPA of ward
 - f. Make payment to trustee of any trust created for ward's benefit

[§_54.12\(2\)](#)

B. Informal administration

- 1) If individual found incompetent, except for individual's incapacity, minor, or spendthrift is entitled to possession of assets of value of amount specified in [§_867.03\(1g\)\(intro.\)](#) or less from estate administered through informal administration under [Ch 865](#), personal representative may, without appointment of a guardian, do any of the following:
 - a. With the approval of the register in probate, take one of the actions specified in [§_54.12\(1\)\(a\)–\(f\)](#)
 - b. With approval of GAL of minor or individual found incompetent, take one of the actions specified in [§_54.12\(1\)\(a\)–\(f\)](#) and file proof of action taken and of approval of GAL with probate registrar instead of filing receipt under [§_865.21](#)

[§_54.12\(3\)](#)

C. Uniform gifts and transfers to minors

If minor, except for minor's incapacity, is entitled to possession of personal property of any value, any Ct in which action or proceeding involving property is pending may, without requiring appointment of guardian, order payment, subject to any limitations Ct may impose, to custodian for minor designated by Ct under §§ 54.854–54.898 or under the uniform gifts to minors act or uniform transfers to minors act of any other state

9. Appointment of Guardian

§ 54.15(8)

A. To be eligible—must provide sworn and notarized statement 96 hours before hearing that

- 1) Proposed guardian is not currently charged with and has not been convicted of crime
- 2) Proposed guardian has not filed for bankruptcy
- 3) Any license, certificate, permit, or registration of the proposed guardian that is required under statutes specified in § 54.15(8)(a)3. for the practice of a profession or occupation has not been suspended or revoked
- 4) Proposed guardian is not listed under § 146.40(4g)(a)2.

[RMC Form GN-3135](#)

- 5) Unless exempted, proposed guardian has completed training required per § 54.26(1), if appointed after 1/1/23. Online training is available through <https://www.uwgb.edu/guardianship-training/>

B. In Ct's discretion to appoint proper guardian

§ 54.15

- 1) Ct must consider nominations made by any person set forth in § 54.15

§ 54.15(4)(b)

- a. Minor over 14 years may nominate
 - Must be in writing

- If minor in armed service, outside Wis, or for other good reason, Ct may dispense with right of nomination

§_54.15(6)

- b. Parent by will may nominate guardian of the estate of a minor child unless Ct finds that appointment is not in minor's best interests

- See Juvenile Guardianships in Juvenile Benchbook

§_54.15(6)

- c. Parent by will may nominate testamentary guardian for person 18 years old or older and found to be in need of guardianship by reason of developmental disability or serious and persistent mental illness

§_54.15(4)(a)

- d. Any person (other than a minor 14 years or younger) may, if person does not have incapacity to such extent that person is unable to form reasonable and informed preference, execute written instrument nominating person to be appointed guardian of person or estate or both if guardian in future appointed

§_54.15(2)

- e. Agent under DPA: nominee as guardian of estate appointed unless Ct finds appointment not in best interest of proposed ward

§_54.15(3)

- f. Agent under PAHC appointed unless Ct finds appointment not in best interest of proposed ward

§_54.15(5)

C. Preference given to one or both parents of minor or to parent(s) of individual with developmental disability or persistent mental illness if parent(s) suitable and willing, unless Ct finds that appointment is not in proposed ward's best interest

§_54.15(4)(c)

If neither parent suitable or willing, Ct may appoint nominee of minor

§_54.15(7)

D. Private nonprofit Corp or other entity may act as guardian of person, estate, or both

Ct may appoint corporate guardian only if no suitable individual available

§_54.10(5), §_54.46(2)(a)

E. Ct may appoint one or more guardians, but co-guardians must agree on each decision unless Ct otherwise orders

§_54.18

10. General Duties and Powers of Guardian

A. General

[§_54.18\(1\)](#)

- 1) Guardian's powers limited to those that are authorized by statute or Ct order and that are least restrictive form of intervention; ward retains all rights not assigned to guardian or otherwise limited by statute

[§_54.18\(2\)\(a\), \(c\)](#)

- 2) Guardian must "[e]xercise the degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person exercises in his or her own affairs" and "[e]xhibit the utmost trustworthiness, loyalty, and fidelity in relation to the ward"

[§_54.18\(3\)\(a\)](#)

- 3) Guardian prohibited from borrowing funds from ward

[§_54.18\(3\)\(c\)](#)

- 4) Ct approval required before guardian can purchase ward's property

[§_54.18\(3\)\(b\)](#)

- 5) Ct approval required of terms, rate of interest, and any requirement for security before ward's funds are lent to another

[§_54.18\(4\)](#)

- 6) Immunity from civil liability provided to guardians if they perform duties "in good faith, in the best interests of the ward, and with the degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs"

B. Guardian of the person

- 1) Preliminary considerations

[§_54.10\(3\)\(a\)2.](#)

- a. To appoint guardian of the person for individual who is incompetent, Ct must also find that "because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety"

[§_54.10\(3\)\(b\)](#)

[Ch_52](#)

- b. Old age, eccentricity, poor judgment, physical disability, or existence of supported decision-making agreement are not reasons to appoint guardian for individual alleged to be incompetent, unless individual is unable to communicate decisions effectively

§_54.25(1)

2) Duties of guardian of person

- a. Make annual report to Ct and Cty, including

- Health condition and location of ward
- Any recommendations regarding ward
- Statement as to whether ward living in least restrictive environment consistent with needs

- b. Endeavor to secure any necessary care or services that are in ward's best interests

- c. Regularly conduct in-person inspection of ward's condition, surroundings, treatment; examine health-care and treatment records; attend staffings; inquire into risks and benefits of and alternatives to proposed treatments; consult with providers of health care and social services in making all necessary treatment decisions

§_54.25(2)

3) Powers of guardian of person

§_54.25(2)(a)

- a. Limited to those authorized by Ct order, statute, or rule

§_54.25(2)(d)3.

- Guardian must make decisions based on considerations of "least possible restriction" on personal liberty and exercise of constitutional and statutory rights; ward's previously and currently stated preferences; and sufficiency of ward's estate to pay for the needed services

§_54.25(2)(b)

- b. Ward who is determined incompetent retains, i.e, never loses, specific rights to do the following:

- Have access to and communicate privately with Ct and with governmental representatives, including right to have input into plans for support services, right to initiate grievances, and right to participate in administrative hearings and Ct proceedings

- Have access to, communicate privately with, and retain legal counsel, with fees paid from ward's income and assets, subject to Ct approval
- Have access to and communicate privately with the protection and advocacy agency and board on aging and long-term care (state ombudsman)
- Give or withhold a consent reserved under Wisconsin Mental Health Act ([Ch. 51](#))
- Protest a residential placement, and petition for Ct review of guardianship, protective services, protective placement, and commitment orders
- Exercise constitutional rights, such as rights to free speech, freedom of association, and free exercise of religious expression

[§ 54.25\(2\)\(c\)](#)

c. Rights that ward retains unless removed by Ct:

- Consent to marriage
- Execute a will
- Serve on jury

See [§ 54.10\(3\)\(f\)](#)

- Right to possess firearm, unless Ct determines that person is prohibited pursuant to 18 [U.S.C.](#) § 922(g)(4). See [MH 1, Sec. 9.D.](#)
- Hold certain operator's licenses
- Consent to sterilization
- Consent to organ, tissue, or bone marrow donation
- Vote

NOTE: Guardian may not exercise these rights on behalf of ward, but Ct may allow ward to exercise any of these rights with guardian approval.

[§ 54.25\(2\)\(d\)2.](#)

d. Once authorized to exercise specific powers, guardian may do the following without Ct approval

[§_54.25\(2\)\(d\)2.ab.](#)

- Consent to “voluntary” receipt of medical examination, medication (including appropriate psychotropic medication), and medical treatment in ward’s best interest, unless ward “protests”

[§_54.25\(2\)\(d\)2.ac.](#)

- Consent to involuntary administration of medical examination, medication other than psychotropic medication, and medical treatment. Guardian may consent to involuntary administration of psychotropic medications only under a protective service order under [§_55.14](#)

[§_54.25\(2\)\(d\)2.b.](#)

- Consent to ward’s participation in research

— Unless clear that ward would never have consented, if it might help ward, or

— If might not help ward but might help others, if no more than minimal risk of harm to ward

[§_54.25\(2\)\(d\)2.c.](#)

- Consent to ward’s participation in research that involves greater than minimal risk, even if it might not help the ward, if consistent with ward’s wishes

[§_54.25\(2\)\(d\)2.d.](#)

- Consent to experimental treatment, if in best interests and no prior expressed contrary wishes
- Give informed consent to social and supported living services
- Give informed consent to release of confidential records
- Make decisions on travel and residency

[§_55.055](#)

- Admit ward to residential facility under 16 beds
- Choose service providers
- Make decisions regarding employment
- Initiate petition to terminate marriage
- Act as advocate in all proceedings, except to enter into contract that binds ward or ward’s property or to represent ward in legal proceedings pertaining to ward’s property (unless also guardian of estate)
- Apply for protective placement under [§_55.075](#) or for commitment under [§_51.20](#) or [§_51.45\(13\)](#)

- Have custody of ward
- Exercise any other power that Ct may specifically identify

C. Guardian of the estate

1) Preliminary considerations

[§_54.10\(3\)\(a\)3.](#)

- To appoint guardian of the estate for individual who is incompetent, Ct must also find that “because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs,” and one of the following applies:

- Individual has property that will be dissipated in whole or in part;
- Individual is unable to provide for own support; or
- Individual is unable to prevent financial exploitation

[§_54.10\(3\)\(b\)](#)

[Ch 52](#)

- Old age, eccentricity, poor judgment, physical disability, or existence of supported decision-making agreement are not reasons to appoint guardian of the estate for an individual alleged to be incompetent unless individual is unable to communicate decisions effectively

[§_54.19](#)

2) Duties of guardian of the estate

- Provide ward with greatest amount of independence and self-determination with respect to property management in light of ward’s functional level, understanding, and appreciation of ward’s functional limitations and ward’s personal wishes and preferences with regard to managing activities of daily living
- Take possession of ward’s real and personal property, but title remains vested in the ward, and not in guardian

- c. Retain, expend, sell, or invest ward's property and income
- d. Determine whether ward executed a will and, if so, the will's location and appropriate persons to be notified of ward's death; if death occurs, notify them of death
- e. Use ward's income and property to maintain and support ward and any dependents
- f. Prepare and file an annual account
- g. Deliver ward's assets to entitled persons upon termination of guardianship
- h. Pay just debts
- i. File with register of deeds of any Cty in which ward possessed real property a sworn and notarized statement that describes property, date ward was determined to be incompetent, contact information of guardian, and any surety on the guardian's bond
- j. Apply to be appointed ward's representative payee, or ensure that representative payee is appointed, if ward receives governmental benefits for which representative payee is appropriate and one has not been appointed
- k. Perform other duties as required by Ct

§_54.19(8)

§_54.20(2)

3) Powers of guardian of the estate requiring Ct approval

§_54.20(2)

§_54.21

- a. Make gifts of ward's property after extensive notice to interested parties and after Ct's consideration of various factors: nature and extent of ward's estate and current and future obligations; opinion of any guardian of the person; nature of property to be transferred; wishes of ward, if ascertainable; past practices of ward; whether ward has executed a will or similar instrument; current or future effect on ward's eligibility for public assistance; etc.
- b. Transfer ward's funds to an existing revocable living trust created for ward's benefit
- c. Establish trusts permitted under federal Medicaid law (special needs trusts)
- d. Purchase annuity or insurance contract and exercise ownership rights

- e. Exercise rights under a retirement plan or account
- f. Exercise any elective inheritance rights
- g. Release or disclaim, under [§ 854.13](#), any interest that ward receives by will, intestate succession, nontestamentary transfer at death, or other transfer
- h. Exercise marital property rights
- i. Support an individual whom the ward is not legally obligated to support
- j. Convey or release a contingent or expectation interest in property
- k. Continue the business of the ward
- l. Pay debts incurred before guardianship or filing of *lis pendens*
- m. Access ward's digital property in accordance with [§ 711.08](#)

[§ 54.20\(3\)](#)

4) Powers of guardian of estate not requiring Ct approval

- a. Support another whom the ward is legally obligated to support
- b. Enter into contract (unless otherwise prohibited under [Ch 54](#))
- c. Exercise options to purchase securities or other property
- d. Authorize access to or release of confidential financial records
- e. Apply for public and private benefits
- f. Retain real or personal property that ward already possesses or acquires by gift or inheritance during guardian's appointment
- g. Subject to [Ch 786](#), sell property at fair market value
- h. Invest proceeds of sale of assets

- i. Settle ward's claims and accounts and appear for and represent the ward in actions
- j. Take any other action, subject to exceptions in [§_54.20\(2\)](#), that is reasonable or appropriate to duties of guardian of estate

[§_54.46\(4\)](#)

5) Ct may require bond

- a. Ct may waive bond requirement in its discretion or if so requested in will containing nomination
 - Unless required under US Uniform Veterans Guardianship Act (UVGA)

[§_54.46\(4\)\(b\)3.](#)

- b. Ct may waive bond if funds in guardian's possession total less than \$100,000 and Ct orders direct deposit in insured financial institution, payable only on Ct order

6) Inventory and accounting

[§_54.60](#)

a. Inventory duties

- To prepare an inventory that lists all of ward's income and assets, including interests in property and any marital property interest, regardless of how asset is titled

[§_54.60\(3\), \(7\)](#)

— Inventory shall be verified and filed with Ct within 60 days after appointment

[§_54.60\(8\)](#)

— If guardian fails to file inventory, Ct must call guardian's attention to neglect

[§_54.60\(8\)](#)

— If guardian continues to neglect duty, Ct must order filing and may assess costs against guardian

[§_54.19\(6\)](#)

- To deliver assets to persons entitled to them at termination of guardianship

[§_54.62](#)

b. Accounting duties

- Must file annual accounts and display assets to Ct by April 15 each year

[§_54.62\(3\), §_867.03\(1g\)](#)

— Except if existing estate is under \$50,000, excluding burial trusts

§_54.62(4)

— Upon notice to adult children, Ct may waive accounting for married persons, or allow modified account

§_54.62(9)

- Ct may at any time require an accounting at a hearing, with notice to interested persons

- For guardian's failure to account, Ct may

§_54.62(8)

— Send notice to show cause at least 20 days before specified time to guardian

§_54.62(8)

— If Ct finds failure, refusal, or neglect is willful or inexcusable, guardian may be fined not more than \$250, imprisoned not to exceed 10 days, or both

7) Compensation, fees, and expenses

- a. Ct shall award petitioner's reasonable Atty fees and costs after considering statutory factors

§_54.46(3)(a)

- If ward has sufficient assets or income, costs may be paid from estate even if ward had executed DPA or PAHC, or engaged in other advance planning to avoid guardianship

- b. If ward indigent:

§_54.46(3)(b), §_54.74

- Fees of GAL and adversary counsel paid by Cty of venue

*Ethelyn IC v
Waukesha Cty
(Gdnship of Ethelyn IC)
[221 Wis. 2d 109](#)
(Ct. App. 1998)*

- c. Costs of evaluation under former §_880.33(1) (now §_54.36(1)) assessed at Ct's discretion

§_54.42(3)

- d. Independent evaluation paid by proposed ward, or

- If ward is indigent, by Cty where petition is heard on the merits

- e. Ct may order fees, expenses, and evaluation costs to be paid from MA if ward receives Social Security, veterans benefits, or other income (See [GA 2, Sec. 5.A.](#))

[§_54.72](#)

Recommendation

- f. Determination of just and reasonable guardian fees must be made by Ct; initial review should be made by Ct staff under Ct guidelines

- Staff may seek additional information and/or refer issue to Ct

[§_54.72\(3\)](#)

- Guardians must get Ct approval before receiving payment

*Yamat v Verma LB**(Gdnship & Protective**Placement of Verma LB)*[214 Wis. 2d 207](#)

(Ct. App. 1997)

- May limit or deny if breach of duty

[§_54.72\(2\)](#)

- g. Guardian shall be reimbursed for reasonable expenses, including “necessary” compensation for Atty, accountant, broker, and others

8) Disposition of real estate

- a. Procedure for disposition of real estate

[§_786.07](#)

- Guardian, any relative, or person on behalf of guardian or relative, files verified petition

[§_786.09](#)

- Ct must determine merits of petition

— May act in summary manner

— Hearing on notice to interested parties not mandated by statute when real estate held in fee simple

- b. Three-step authorization procedure

[§_786.07](#)

- Authorization to dispose of real estate

[§_786.11](#)

- Approval of contract for disposal

§_786.17

- Approval of disposition of proceeds

§_786.18, §_786.19,
§§_786.26–786.35

— Special statutory provisions exist for disposition of ward's interest in real estate not in fee simple

Galster v
First Nat'l Bank of
Kenosha (Will of Barnes)
[4 Wis. 2d 22](#) (1958)
Boehmer v Boehmer
[264 Wis. 15](#) (1953)

- Special problems of joint tenancies—guardian may not elect to terminate funds or property held in joint tenancy without Ct approval
- Must hold joint funds or proceeds of sale of joint property in *custodia legis*, with Ct to decide whether guardian or joint tenant can withdraw funds
- Ct may authorize use of funds for support of ward

c. Grounds for sale, mortgage, or lease of real estate

§_786.06(1)

- When personal property and income of ward insufficient for payment of debts and maintenance and education of ward and ward's family

§_786.06(2)

- When interests of ward will be promoted by proposed disposition because real estate otherwise subject to waste, unproductive, or other circumstances compel disposition

§_786.14

- Disposition of real estate cannot be contrary to terms of will or conveyance by which ward acquired property

§_786.21

- No lease of ward's land can exceed 5 years

§_786.12

d. Guardian may acquire real estate for ward, subject to Ct approval

- If purchase will substantially promote ward's interests

§_54.18(3)(c)

- BUT, guardian may NOT purchase property of ward except at fair market value, subject to [Ch](#) 786, and with approval of Ct

[§_54.68](#)

11. Review Conduct and Removal of Guardian

[§_54.68\(2\)](#)

A. Guardian may be removed for cause

- 1) Failing to file timely an inventory or account, as required under [Ch 54](#), that is accurate and complete
- 2) Committing fraud, waste, or mismanagement
- 3) Abusing or neglecting the ward or knowingly permitting others to do so
- 4) Knowingly isolating a ward from the ward's family members or violating Ct order under [§_50.085\(2\)](#)
- 5) Engaging in self-dealing
- 6) Failing to provide adequately for ward's personal needs from ward's available assets and income, including any available public benefits
- 7) Failing to exercise due diligence and reasonable care in assuring that ward's personal needs are being met in the least restrictive environment consistent with ward's needs and incapacities
- 8) Failing to act in the best interests of the ward
- 9) Failing to disclose conviction for a crime that would have prevented appointment of the person as guardian
- 10) Failing to disclose that the guardian is listed under [§_146.40](#)
- 11) Other than as provided in [§_54.68\(2\)\(a\)–\(i\)](#), failing to perform any duties of a guardian or performing acts prohibited to a guardian as specified in [§§_54.18](#), [54.19](#), [54.20](#), [54.22](#), [54.25](#), and [54.62](#)

B. Procedure

§_54.68(3)

Upon the filing of a petition for review of the conduct of a guardian, Ct shall hold hearing in not less than 10, nor more than 60, days and shall order that petitioner provide notice of hearing to ward, guardian, and any other persons as determined by Ct. Ct may authorize petitioner's use of any of methods of discovery specified in [Ch 804](#) in support of petition to review conduct of the guardian

§_54.68(4)

C. Remedies of the Ct

- 1) If petitioned by any party or on Ct's own motion and after finding cause as specified in [§_54.68\(2\)](#), Ct may do any of the following:
 - a. Order guardian to file inventory or other report or account required of the guardian
 - b. Require guardian to reimburse ward or, if ward is deceased, ward's estate for losses incurred as the result of guardian's breach of a duty to ward
 - c. Impose forfeiture of up to \$10,000 on guardian, or deny compensation for guardian, or both
 - d. Remove guardian
 - e. Enter any other order that may be necessary or appropriate to compel guardian to act in ward's best interests or to otherwise carry out guardian's duties

§_54.68(5)

D. Removal of paid guardian

Ct may remove a paid guardian if changed circumstances indicate that previously unavailable volunteer guardian is available to serve and that change would be in ward's best interests

§_54.852

12. US Uniform Veterans Guardianship Act

A. Applicability

§_54.852(3)

- 1) Whenever it is necessary, before payment of benefits, that a guardian be appointed
- 2) “Ward” under §_54.852(1)(g) means beneficiary of USDVA

§_54.852(1)(a)

B. Administrator

- 1) Is party in interest in any proceeding

§_54.852(2)

- a. To appoint or remove guardian
- b. To remove disability of minority or mental incapacity

§_54.852(10)(c)

- 2) Must be notified of any petition, motion, or other pleading pertaining to any account or to any matter that is filed in guardianship proceedings or in any proceeding for purpose of removing the disability of minority or mental incapacity

C. Notice

- 1) Given at least 15 days before hearing

§_54.852(10)(c)

- a. In writing, of time and place, to USDVA office where Ct located

§_54.852(8)

- b. To ward, to other persons, and in such manner as provided by statute, and to USDVA

§_54.852(4)

D. No guardian to have more than 5 wards EXCEPT

- 1) If all wards members of one family
- 2) If guardian is Cty with population of 100,000 or more

3) If guardian is bank or trust company

E. Petition

1) May be filed by

- a. Relative or friend of ward
- b. Any person authorized by law to file

§_54.852(5)(a)

- If no person authorized, or authorized person fails to file within 30 days after USDVA's mailing of notice of necessity to file, petition may be filed by any resident of Wis

2) Contents

§_54.852(5)(b)

- a. Name, age, place of residence of ward

§_54.852(5)(b)

- b. Name and residence of nearest relative, if known

§_54.852(5)(b)

- c. Fact that ward entitled to receive benefits payable by or through USDVA

§_54.852(5)(b)

- d. Amount of moneys due and amount of probable future payments

§_54.852(5)(c)

- e. Name and address of person or institution, if any, having actual custody of ward

§_54.852(5)(c)

- f. Name, age, relationship, if any, occupation, and address of proposed guardian

§_54.852(5)(c)

- g. If nominee is natural person, number of wards for whom nominee presently acting as guardian

§_54.852(5)(d)

- h. If ward is individual found incompetent, petition must include that such ward has been rated incompetent by USDVA

F. Evidence of necessity for guardian

§_54.852(6)

- 1) If petition for minor, certification from USDVA setting forth age of minor and fact that appointment of guardian is condition precedent to payment of any moneys due minor by USDVA shall be prima facie evidence of necessity for such appointment

§_54.852(7)

- 2) If petition for individual found incompetent, certification from USDVA that such person has been rated incompetent by USDVA and fact that appointment of guardian is condition precedent to payment of any moneys due ward by USDVA shall be prima facie evidence of necessity for such appointment

G. Duties of guardian

§_54.852(9)

- 1) Upon appointment, must file bond
 - a. Approved by Ct
 - b. In amount not less than estimated value of personal estate and anticipated income of ward during ensuing year
- 2) When bond tendered by guardian with personal sureties, must be 2 sureties
 - a. Ct may require additional security
 - b. Ct may require corporate surety bond

§_54.852(10)

- 3) Guardian to file accounts as provided in [Ch 54](#), except if excused under [§_54.66\(2\)](#)
 - a. Certified copy of account must be sent to USDVA office where Ct located

§_54.852(11)

- b. If guardian fails to file account as required or fails to furnish USDVA with true copy of any account, petition, or pleading as required by [§_54.852\(10\)\(c\)](#), failure may be ground for removal

§_54.852(13)

- 4) Guardian must invest surplus of funds of ward's estate as authorized by law but ONLY upon prior order of Ct, EXCEPT

May invest in direct unconditional interest-bearing obligations of US without prior Ct authorization

§_54.852(14)

- 5) Guardian shall not apply any portion of income or estate for support or maintenance of any person other than ward, spouse, and minor children of ward, except upon petition to and prior order of Ct after hearing

[§_54.852\(15\)](#)

- 6) Guardian may purchase home for ward or to protect ward's interest or, if ward not a minor, as home for ward's dependent family

H. Discharge of guardian

[§_54.852\(17\)](#)

- 1) Certificate by USDVA showing that minor ward has attained majority or that incompetent ward has been rated competent by USDVA shall be prima facie evidence that ward has attained majority or recovered competency
- 2) Upon hearing, after notice and determination by Ct that ward attained majority or recovered competency, guardian must file final account
- 3) Upon hearing, after notice to former ward and USDVA, upon approval of final account, and upon delivery to ward of assets due from guardian, guardian must be discharged and sureties released

13. Alternatives to Guardianship

[§_54.46\(1\)\(a\)2.](#)

NOTE: If advance planning renders guardianship unnecessary, then Ct must dismiss petition.

[§_155.01\(10\)](#)

A. Power of Atty for Health Care (PAHC)

- 1) May be used in lieu of guardian of person
 - a. Limited authority to admit principal to nursing home under [§_155.20\(2\)\(b\)](#)

[Ch_244](#)

B. Uniform Durable Power of Atty for Finances and Property Act (DPA)

- 1) May be used in lieu of guardian of estate

[§_244.04](#)

- 2) Survives disability or incapacity of principal unless DPA expressly provides that it is terminated by incapacity

[§_244.02\(7\)\(a\)](#)

[§_244.09](#)

- 3) May become effective immediately or only if principal becomes incapacitated, under definition in [§_244.02\(7\)\(a\)](#), as determined by licensed physician or psychologist

§_244.10(1)(d), (3)

- 4) DPA not affected by passage of time, unless document so states

- 5) Agent has no duty of annual accounting to Ct or oversight by Ct, except as specifically ordered

§_244.08(2)

If principal is adjudicated incompetent and Ct appoints guardian or other fiduciary after DPA created, Ct may revoke DPA or limit agent's authority

§_244.41(1)(b)

- 6) Agent may not gift to self unless there is explicit intent in writing from principal allowing gift

See §_244.03(2)

- 7) DPA lacks health-care decision-making power. PAHC must be given in conformity with [Ch 155](#)

§_155.10

- a. Stringent witnessing requirements

- b. DPA agent may not witness health-care provisions

§_244.16

- 8) Petition to review agent's performance
 - a. Interested party may petition Ct in Cty where principal present or Cty of principal's legal residence to review whether agent performing duties in accordance with terms of DPA

 - b. If Ct finds after hearing that agent has not been performing in accordance with terms of DPA, Ct may grant appropriate relief, which may include, but is not limited to:
 - Direct agent to act in accordance with terms of DPA

 - Require agent to report to Ct concerning performance of duties at periods of time established by Ct

 - Rescind all powers of agent to act under the DPA

 - c. If principal has designated alternate agent and if powers of first-designated agent are rescinded, alternate agent is agent

9) Revocation of DPA

§_244.16(1)

- a. May be terminated by Ct for good cause shown

Knight v Milw Cty
(Gdnship & Protective
Placement of Muriel K)
[2001 WI App 147](#)
[246 Wis. 2d 691](#)
rev'd on other grounds
[2002 WI 27](#)
[251 Wis. 2d 10](#)

- Holder of DPA has right to speak at hearing revoking DPA

§_244.10(1)(c)

- b. If principal still competent, revoked on written revocation of principal

§_244.10(1)(a), (4)

- c. Revoked on death of principal, effective on notice to agent

§_244.10(1)(f)

- d. Revoked on death of agent, if successor not named in DPA

[Ch 52](#)

C. Supported decision-making agreements

1) Definitions

§_52.01(6)

- a. “Supported decision-making” means “a process of supporting and accommodating an adult with a functional impairment to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult”

§_52.01(2)

- b. “Functional impairment” means any of the following:

- A physical, developmental, or mental condition that substantially limits one or more of an individual’s major life activities, including any of the following:
 - Capacity for independent living
 - Self-direction
 - Self-care
 - Mobility

— Communication

— Learning

- Impairment, as defined under [§_54.01\(14\)](#)
- Other like incapacities, as defined under [§_54.01\(22\)](#)

[§_52.03](#)

- 2) Evidence of a supported decision-making agreement cannot be used as evidence of incapacity or incompetency and does not preclude an adult with a functional impairment who has entered into such an agreement from acting independently of the agreement

D. Custodial trusts

See [PR 9](#), this volume

GA 2: GUARDIANSHIP OF INDIVIDUALS FOUND INCOMPETENT

1. Petition Requirements

A. See generally [GA 1, Sec. 4.B.](#)

[§_54.34\(2\)](#), (2m)

B. Petition for guardianship may include petition for protective services or placement under [Ch 55](#), but must include petition under [Ch 55](#) for individual residing in facility of 16 or more beds and when involuntary administration of psychotropic medications is requested

[§_55.14\(3\)](#)

C. Additional requirements of petition if alleged that person not competent to refuse psychotropic medication

See [GA 1, Sec. 4.F.](#)

[§_54.38\(2\)](#)

2. Notice

[§_54.38\(1\)](#)

A. Failure to give proper notice of original petition deprives Ct of jurisdiction unless receipt of notice is waived

1) By interested person

§_54.38(2)(b)4.

2) By Ct for “other interested person”

§_54.38(2)(a)

B. Must be given to proposed ward by personal service and to guardian, if any, by registered or certified mail or by personal service, at least 10 days before hearing

1) If proposed ward in custody or confinement

a. By registered or certified mail to custodian, who must immediately serve proposed ward, at least 10 days before hearing

b. Custodian must inform proposed ward of complete contents of notice and certify service and notification

c. Custodian must return certification and notice to Ct

2) Must include names of all persons petitioning for guardianship

§_54.38(1)

3) Must have copy of petition attached to notice

§_54.38(2)(b)1.–9.

C. Must be served personally or by mail, at least 10 days before hearing, on the following:

1) Proposed ward’s counsel, if any

2) Proposed ward’s guardian ad litem (GAL)

- 3) Presumptive adult heirs, as specified in § 851.09, of proposed ward
- 4) Other interested persons, unless specifically waived by Ct
- 5) Agent under any durable power of Atty (DPA) or power of Atty for health care (PAHC) of ward
- 6) Any person who has legal or physical custody of proposed ward
- 7) Any public or private agency, charity, or foundation from which proposed ward receiving aid or assistance
- 8) Proposed guardian for proposed ward
- 9) Any other person Ct requires

§ 54.38(4)

D. Same notice requirements for rehearing to determine whether ward proper subject to continue under guardianship

§ 54.40

3. Appointment and Duties of GAL

A. Ct must appoint GAL whenever guardianship petition or petition for receipt and acceptance of foreign guardian is filed, or whenever Ct reviews scope of guardianship, provides protective placement or orders protective services, reviews protective placement, terminates protective placement, expands guardianship order, reviews incompetency and terminates guardianship, reviews guardian's conduct, or at any other time that Ct determines necessary

- 1) Must be appointed at time of filing

§ 54.40(2)

Tamara LP v

Cty of Dane

(Gdnship of

Tamara LP)

[177 Wis. 2d 770](#)

(Ct. App. 1993)

- 2) Must be disinterested person

§_54.40(2)

- 3) Must be Atty eligible for appointment of GAL for an adult pursuant to [SCR](#) Ch 36

§_54.40(3)

B. GAL must advocate for best interests of proposed ward as to guardianship, protective placement, and protective services

GAL must function independently in same manner as Atty for a party and must consider, but is not bound by, wishes of proposed ward

C. GAL has no rights or duties of general guardian

§_54.40(4)

D. GAL must do all the following

- 1) Interview proposed ward or ward and explain contents of petition, applicable hearing procedure, right to counsel, and right to request or continue a limited guardianship
- 2) Advise proposed ward or ward, both orally and in writing, of that person's rights to be present at hearing, to jury trial, to appeal, to counsel, and to independent medical or psychological examination on issue of competency, at Cty expense if person is indigent
- 3) Interview proposed guardian, the proposed standby guardian, if any, and any other person seeking appointment as guardian and report to Ct concerning suitability of each individual interviewed to serve as guardian and concerning statement under §_54.15(8)
- 4) Review any PAHC under [Ch](#) 155, any DPA under [Ch](#) 244 executed by the proposed ward, and any other advance planning for financial and health-care decision-making in which the proposed ward had engaged
 - a. Interview any agent appointed by the proposed ward under any document specified in [para. 4\)](#) above
 - b. Report to Ct concerning whether proposed ward's advance planning is adequate to preclude need for guardianship

- 5) Attend all Ct proceedings related to the guardianship

§_54.40(4)(ds)

- 6) Notify guardian of right to be present at and participate in the hearing, to present and cross-examine witnesses, to receive a copy of any evaluation under §_55.11(1)(intro.) or (2), and to secure and present report on independent evaluation under §_54.42(3)
- 7) Request that Ct order additional medical, psychological, or other evaluation, if necessary

See §_54.42(6)

- 8) Inform Ct and petitioner or petitioner's Atty if proposed ward or ward objects to finding of incompetency, present or proposed placement, or GAL's recommendation concerning best interests or if proposed ward's or ward's position on these matters is ambiguous. If GAL recommends that hearing be held in a place other than a courtroom, GAL shall provide the information under §_54.40(4)(f) as soon as possible
- 9) Inform the Ct and the petitioner or petitioner's counsel, if counsel is requested
- 10) Present evidence concerning best interests, if necessary
- 11) Report to the Ct on any relevant matters that the Ct requests

§_55.18(2)

E. GAL duties in reviews

- 1) Review Cty Dept report filed under §_55.18(1)(a)1., report required under §_54.25(1)(a), and any other relevant reports on ward's condition and placement
- 2) Meet with ward and contact ward's guardian and orally explain to ward and guardian all of following:
 - a. Procedure for review of protective placement

- b. Right of individual to appointment of legal counsel
 - c. Right to an evaluation
 - d. Contents of the report
 - e. That change in or termination of protective placement may be ordered by Ct
 - f. Right to a hearing and an explanation that individual or individual's guardian may request hearing that meets requirements under [§_55.10\(2\)–\(4\)](#)
- 3) Provide information under [§_55.18\(2\)\(b\)](#) to individual and to individual's guardian in writing
 - 4) Review individual's condition, placement, and rights with individual's guardian
 - 5) Ascertain whether the individual wishes to exercise any rights under [§_55.18\(3\)\(b\)](#), (c), or (d)

[§_55.18\(2\)\(f\)](#)

- 6) Within 30 days after appointment, file with the Ct a written report addressing whether the individual appears to continue to meet the standards for protective placement under [§_55.08\(1\)](#) and whether the protective placement is in the least restrictive environment that is consistent with the individual's needs. The report shall also state whether:
 - a. Evaluation under [§_55.18\(3\)\(b\)](#) is requested by individual, guardian, or GAL
 - b. Modification or termination of protective placement is requested by individual or individual's guardian
 - c. Appointment of legal counsel is requested by individual or guardian or recommended by GAL
 - d. Hearing that meets requirements of [§_55.10\(2\)–\(4\)](#) is requested by individual, guardian, or GAL

7) Certify to Ct that GAL has complied with the requirements of [§_54.18\(2\)\(a\)–\(e\)](#)

[§_54.40\(5\)](#)

F. GAL may tell jury that GAL represents interests of proposed ward or ward

[§_54.40\(6\)](#)

G. GAL appointment terminates upon entry of Ct’s final order or upon termination of any appeal in which GAL participates

- 1) Ct may extend appointment or reappoint GAL by order specifying scope of responsibilities
- 2) At any time, GAL, any party, or person for whom appointment is made may request that Ct terminate any extension or reappointment

[§_54.40\(6\)](#)

H. GAL may appeal, may participate in an appeal, or may do neither

But Appellate Ct may order GAL to participate in appeal

[§_54.74](#)

I. On Ct order, GAL must be allowed reasonable compensation paid from ward’s income or assets, if sufficient, or, if insufficient, by Cty of venue

- 1) Compensation for GALs may be limited
- 2) If Ct dismisses petition under [Ch 54](#), Ct shall order petitioner to pay compensation to GAL

4. Right to Counsel

[§_54.42\(1\)\(a\)](#)

A. Must be appointed in addition to GAL in all other guardianship petitions based on incompetency IF

- 1) Proposed ward or guardian requests counsel, or

- 2) GAL or any person states that proposed ward objects to petition, or
- 3) Ct determines that counsel required in interests of justice

5. Getting and Paying for Counsel

§_54.42(1)(c)

A. If person entitled to counsel under [Sec. 4.A.](#), *supra*, but cannot obtain legal representation, Ct shall appoint advocacy counsel

Recommendation

- 1) Refer to SPD for indigency determination under [§_977.07\(1\)](#)

St ex rel Chiarkas v Skow
[160 Wis. 2d 123](#) (1991)

- a. Ct may not order SPD to represent parties not statutorily indigent except under unique and unusual circumstances

§_54.42(1)(c)

- b. If SPD is appointed in [Ch. 55](#) proceeding, Ct shall appoint SPD for [Ch. 54](#) proceeding

§_54.46(3)(b)

- 2) If SPD rejects and person cannot obtain legal counsel, Cty in which venue lies for guardianship proceeding shall pay fees for GAL and advocacy counsel

Legal Opinion, 1/15/91;
 Office of Legal Counsel;
 DHFS

- 3) If ward in nursing home and receiving medical assistance, Ct may order GAL fee, Atty fee, psychological report, and comprehensive evaluation to be paid from ward's Social Security, veterans benefits, or other income (medical assistance will make up shortfall). This is in lieu of Cty payment of these expenses

§_54.42(4)
Cf. 54.46(3)(a) (payment
 of petitioner's fees and
 costs)

- 4) If Ct appoints guardian, Ct may allow payment of expenses in contesting proceedings, if
 - a. Ct determines payment is reasonable
 - b. Payment from ward's income or assets

- 5) If order for payment entered under [para. 4\)](#) above, copy of order to payee and medical assistance caseworker

[§_54.46\(3\)\(c\)](#)

- 6) If guardian is not appointed, petitioner is liable for GAL fees and proposed ward's counsel

B. Counsel in Protective Placement Cases

[§_55.105](#)

- 1) If there is a petition for protective placement under [Ch 55](#) and the proposed ward is objecting to the placement, SPD shall appoint counsel for the person

[§_55.107](#)

- 2) After hearing, Ct may order the person to reimburse SPD for the representation or order SPD to do an indigency determination under [§_977.07](#) and report back to Ct. Based on report, Ct could find person indigent or order reimbursement

[§_54.46\(3\)\(a\)](#)

C. Petitioner's Atty Fees

- 1) If guardian is appointed, Ct shall order payment of petitioner's reasonable Atty fees and costs from ward's assets unless Ct finds that it would be inequitable to do so after considering the following:
- a. Petitioner's interest in the guardianship and whether there was a conflict
 - b. Ability of ward's estate to pay fees
 - c. If matter was contested, nature of contest
 - d. Extent of any advance planning done by the ward in executing DPA or PAHC
 - e. Any other relevant factor

6. Right to Jury Trial

[§_54.42\(2\)](#)

A. If demanded by proposed ward, counsel, or GAL at least 48 hours before time set for hearing

§_756.06(2)(b)

B. Six-person jury, unless larger jury requested by party or Ct on own motion

7. Hearing

A. Time limits

§_54.44(1)(a)

- 1) Petition for guardianship shall be heard within 90 days after it is filed, except

§_54.44(1)(b)

- a. Petitions for guardianship for those admitted to nursing home or to facility under §_50.06 shall be heard within 60 days after petition filed unless an individual objects to another individual's handling of the §_50.06 responsibilities or if incapacitated subject verbally objects or otherwise actively protests, hearing to be held as soon as possible

§_55.14(7)

- b. Petition for protective services must be heard within 30 days if psychotropic medications are requested

Tina B v Richard H
(In re Gdnship of
Elizabeth MH)
[2014 WI App 123](#), ¶¶ 19–32,
[359 Wis. 2d 204](#)

- 2) Mandatory statutory time periods cannot be changed by stipulation or waiver

B. Procedure

- 1) Hearing must be closed

§_54.44(5)

- a. Unless proposed ward or Atty acting with proposed ward's consent moves that it be open

§_54.44(5)

- b. If hearing closed, only persons in interest, including representatives of service providers and their Attys and witnesses, may be present

§_54.42(2)

- 2) Proposed ward, Atty, or GAL has right to present and cross-examine witnesses, including physicians or psychologists reporting to Ct

§_54.44(5m)

Ct's discretion to permit interested persons to participate

C. Appearance of proposed ward

§_54.44(4)

- 1) Ward has right to attend and if unable to attend because of Ct's physical inaccessibility or lack of transportation, Ct MUST, on request, hold hearing where proposed ward can attend

*Racine Cty v PB (In re
Gdnship & Protective
Placement of PB)*
[2022 WI App 62](#)
[405 Wis. 2d 383](#)

- a. "To attend" means the right to be physically present in person

- 2) Attendance may be waived by GAL

§_54.44(4)

- a. Considerations in making waiver decision:

- Ability of the individual to understand and meaningfully participate,
- Effect of attendance on individual's physical or psychological health in relation to importance of proceeding, and
- Individual's wishes

*Jefferson Cty v Joseph S
(In re Protective
Placement with Gdnship
of Joseph S)*
[2010 WI App 160](#)
[330 Wis. 2d 737](#)

- 3) Ct may lose competency to proceed if disruptive proposed ward is removed from hearing without requisite warning

§_54.36

D. Report on mental condition of proposed ward

1) Licensed physician or licensed psychologist, or both, before hearing, must provide written statement on mental condition, based on examination of ward

a. Examining physician or psychologist, or GAL, must advise proposed ward

- Statements may be used for finding of incompetency or a finding that proposed ward is a spendthrift
- Proposed ward has right to remain silent and refuse to participate

[§_54.36\(1\)](#)

- Examiner must report to Ct even if proposed ward remains silent

b. Medical records and psychological reports, pursuant to [§_905.04\(4\)\(a\)](#) and (b), are not privileged in cases involving guardianship, protective services, or protective placements

[§_54.36\(1\)](#)

- Statement by appointed physician or psychologist under [§_54.36\(1\)](#) is not privileged under [§_905.04](#) (this does not affect hearsay issue if that issue is raised at hearing)

[§_54.44\(1\)](#)

2) Copy of report must be provided to ward, GAL, and legal counsel 96 hours before hearing

NN v Cty of Dane
(*Gdnship & Protective*
Placement of NN)
[140 Wis. 2d 64](#)
(Ct. App. 1987)

Failure to timely file may be jurisdictional defect

RS v Milw Cty
(*Gdnship of RS*)
[162 Wis. 2d 197](#) (1991)

3) If report is written and author does not testify, report is hearsay and inadmissible if objected to

[§_807.13](#)
[§_753.24](#)

Witnesses may testify and be cross-examined by telephone or live audiovisual means, subject to conditions in [§§_807.13, 885.50–885.64](#) and constitutional requirements

[§_54.36\(1\)](#)

- 4) Pre-petition reports may be used if recent and describe proposed ward's or ward's current state

§_54.42(3)

- 5) If requested, proposed ward has right to independent medical or psychological examination
 - a. If indigent, at Cty's expense
 - b. Right to present report of independent examination or examiner's testimony at hearing as evidence

§_54.44(2)

E. Burden of proof: Elements to be proved by clear and convincing evidence for all [Ch 54](#) procedures

RS v Milw Cty

(Gdnshp of RS)

[162 Wis. 2d 197](#) (1991)

Colliton v Colliton

(In re Gdnshp of Colliton)

[41 Wis. 2d 487](#) (1969)

- 1) Burden of proof rests on party asserting mental incompetency

§_54.10(3)(a)2.

- 2) For purposes of appointment of guardian of person, Ct must find that, because of impairment, individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that individual is unable to meet essential requirements for own physical health and safety

§_54.10(3)(a)3.

- 3) For purposes of appointment of a guardian of the estate, Ct must find that, because of impairment, individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of individual's property or financial affairs, to the extent that any of the following applies:

- a. Individual has property that will be dissipated in whole or in part
- b. Individual is unable to provide for own support
- c. Individual is unable to prevent financial exploitation

§_54.10(3)(a)4.

- 4) For purpose of appointment of guardian of the person or a guardian of the estate, or both, Ct must find that individual's need for assistance in decision-making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care,

assistive devices, supported decision-making agreement under [Ch 52](#), or other means that individual will accept

[§_54.10\(3\)\(b\)](#)

[Ch 52](#)

- 5) Unless the proposed ward is unable to communicate decisions effectively in any way, the determination of incompetency may not be based on mere old age, eccentricity, poor judgment, physical disability, or existence of supported decision-making agreement

[§_54.10\(3\)\(c\)](#)

- 6) Decision made on basis of
- a. GAL's report, as required in [§_54.40\(4\)](#)
 - b. Medical or psychological report provided under [§_54.36\(1\)](#) and any additional medical, psychological, or other evaluation ordered by the Ct under [§_54.40\(4\)\(e\)](#) or offered by a party and received by the Ct
 - c. Whether proposed ward has engaged in any advance planning for financial and health-care decision-making that would avoid guardianship, including by executing DPA under [Ch 244](#), PAHC, as defined in [§_155.01\(10\)](#), trust, or jointly held account
 - d. Whether other reliable resources are available to provide for individual's personal needs or property management, and whether appointment of guardian is the least restrictive means to provide for individual's need for substitute decision maker
 - e. Preferences, desires, and values of individual with regard to personal needs or property management
 - f. Nature and extent of individual's care and treatment needs and property and financial affairs
 - g. Whether individual's situation places individual at risk of abuse, exploitation, neglect, or violation of rights
 - h. Whether individual can adequately understand and appreciate nature and consequences of individual's impairment
 - i. Individual's management of activities of daily living

- j. Individual's understanding and appreciation of nature and consequences of any inability individual may have with regard to personal needs or property management
- k. Extent of demands placed on individual by own personal needs and by nature and extent of individual's property and financial affairs
- l. Any physical illness of the individual and the prognosis of the individual
- m. Any mental disability, alcoholism, or other drug dependence of the individual and prognosis of mental disability, alcoholism, or other drug dependence
- n. Any medication with which individual is being treated and medication's effect on individual's behavior, cognition, and judgment
- o. Whether effect on individual's evaluative capacity is likely to be temporary or long-term, and whether the effect may be ameliorated by appropriate treatment
- p. Whether any alternatives to guardianship, including supported decision-making under [Ch 52](#), have been attempted, and, if applicable, the degree to which they have been attempted, the length of time they have been attempted, and whether they have been attempted in a manner sufficient to demonstrate that alternatives to guardianship are insufficient to enable the individual to adequately exercise the right or rights in question
- q. Other relevant evidence

F. Findings

§_54.15
Brezinski v Barkholtz
(Gdnshp of Schmidt)
[71 Wis. 2d 317](#) (1976)

1) Suitability of proposed guardian

§_54.15

- a. May be disqualified for conflict of interest, including

- Employment
- Claims against ward
- Joint holdings with ward
- Receipt of ward's assets as transfers or indebtedness to ward
- Need for accounting by proposed guardian for prior accounts

§_54.15(8)

2) Statement required of proposed guardian

- a. At least 96 hours before hearing under §_54.44, proposed guardian shall submit to Ct sworn and notarized statement

- As to whether any of following is true:

— Proposed guardian is currently charged with or has been convicted of a crime, as defined in §_939.12

— Proposed guardian has filed for or received protection under federal bankruptcy laws

— Any license, certificate, permit, or registration of the proposed guardian that is required under statutes specified in §_54.15(8)(a)1m.c. or by laws of another state for practice of a profession or occupation has been suspended or revoked

— Proposed guardian is listed under §_146.40(4g)(a)2.

[RMC Form GN-3135](#)

- That, unless exempted, guardian has completed training required per §_54.26(1), if appointed after 1/1/23. Online training is available through <https://www.uwgb.edu/guardianship-training/>

- b. If [§_54.15\(8\)\(a\)1m.a., b., c., or d.](#) applies to proposed guardian, “he or she shall include” in sworn and notarized statement description of circumstances surrounding the applicable event under [§_54.15\(8\)\(a\)1m.a., b., c., or d.](#)

[§_54.44\(6\)](#)

- 3) If proposed guardian unsuitable, hearing may be rescheduled for date within 30 days to consider different guardian

[§_54.48](#)

- 4) Finding of incompetency and appointment of guardian NOT grounds for involuntary protective placement or provision of protective services

[SCR 21.17](#)

[SCR 22.35](#)

- 5) If person is Atty, Ct must immediately file a copy of the findings and order with clerk of Supreme Ct and Director of the Office of Lawyer Regulation. Supreme Ct must immediately order Atty to show cause why Atty’s license to practice law should not be suspended by reason of medical incapacity

[§_54.34\(2m\)](#)

- 6) If ward voluntarily entered facility licensed for 16 or more beds, guardianship must be accompanied by protective placement

[§_54.46\(2\)\(b\);](#)

see also [§_54.10\(3\)\(c\)3.](#)

- 7) If proposed ward executed PAHC under [Ch 155](#) before finding of incompetency, Ct may revoke or limit PAHC only for good cause

- a. If Ct revokes or limits PAHC, Ct may allow guardian

- To make some or all health-care decisions for ward instead of health-care agent under terms of PAHC

[§_54.46\(2\)\(b\)](#)

- b. If Ct does not revoke or limit PAHC, it remains in effect and guardian makes no health-care decisions

- c. If guardian is also health-care agent, Ct does not need to revoke or limit PAHC for guardian to make health-care decisions

- 8) If person not competent to refuse psychotropic medication, and allegations under [§_55.14](#) proved

[§_54.25\(2\)\(d\)2.ac.](#)

- a. Ct to appoint guardian to consent to or refuse psychotropic medication on behalf of person
- b. Ct order may authorize guardian to permit use of force to medicate
 - Guardian can also approve “voluntary” administration of psychotropic medication without Ct order if ward does not “protest”

§_54.25(2)(d)2.ab.

- Protest means more than one discernable negative response, other than mere silence

8. Selection of Guardian

§_54.15(6)

- A. Parent may, by will, nominate guardian for adult found in need of guardianship because of developmental disability or serious and persistent mental illness**

§_54.10(3)

- B. May appoint separate guardian of person and estate**

§_54.10(5), §_54.46(2)(a)

- C. If co-guardians appointed, default position is they must agree**

§_54.15(4)

- D. If proposed ward, at time of sufficient capacity, executes written instrument nominating guardian of person or property, nominee of proposed ward must be appointed unless Ct finds that not in best interest of proposed ward**

§_54.15(9)

- E. No person who has guardianship of the person of 5 or more adult wards unrelated to guardian may accept appointment as guardian of person of another unrelated ward, unless Ct determines that waiver of limitation on number of unrelated adult wards is appropriate**

- F. Corporate guardians**

§_54.15(7)

- 1) Nonprofit corporation approved by DHS may accept guardianship of unlimited number of unrelated wards

- 2) Corporate guardian to be appointed only if no suitable individual guardian available

9. Guardianships

A. Guardian of estate

1) Guardian's bond

- a. On appointment of guardian of estate, Ct may require bond conditioned on faithful performance of duties

§_54.46(4)

- Ct may waive bond requirement in its discretion or if requested in will that contains nomination

— Unless required under Uniform Veterans Guardianship Act

§_54.46(4)(b)3.

- b. Ct may waive bond if funds in guardian's possession total less than \$100,000 and Ct orders direct deposit in insured financial institution, payable only on Ct order

2) Guardian's duties and powers

§_54.19

- a. Duties of guardian of the estate

- See [GA 1, Sec. 10.C.2](#)), for list of duties under §_54.19

§_54.60(1), (3)

- Guardian must file inventory within 60 days after appointment

— Marital property interest should be included

§_54.60(2)

— Contents should state how assets held or titled

§_54.20(2)

b. Powers of guardian of the estate requiring Ct approval

- See [GA 1, Sec. 10.C.3](#)), for list of powers under §_54.20(2)

§_54.20(3)

c. Powers of guardian of estate not requiring Ct approval

- See [GA 1, Sec. 10.C.4](#)), for list of powers under §_54.20(3)

§_54.68

3) Removal of guardian of estate. See [GA 1, Sec. 11](#)

§_54.18

B. Guardian of the person

1) General considerations

a. Guardianship of the person should limit guardian to powers that are least restrictive form of intervention

§_54.25(2)(c)1.a.–g.

b. Ward retains all rights not assigned to guardian

- See [GA 1, Sec. 10.B.3\)c.](#)

c. Legal rights may be restored

§_54.64(2)

- Guardian, ward, or any interested person may file petition 180 days after previous Ct hearing, requesting termination of guardianship or restoration of legal right(s) and specifying reason(s)

§_54.64(2)(c)

- After hearing on petition or on own motion, Ct may terminate or modify guardianship, including restoring certain rights to the ward

Colliton v Colliton
(In re Gdnshp of Colliton)
[41 Wis. 2d 487](#) (1969)

- Burden of proof falls on ward to establish ward's return to state of mental competence by the requisite quantum of proof

[§_54.46\(4\)](#)

- d. Order appointing guardian shall specify amount of bond, if any

[§_54.25\(1\)](#)

- 2) Duties of guardian of the person

See [GA 1, Sec. 10.B.2](#)), for list of duties

[§_54.25\(2\)](#)

- 3) Powers of guardian of the person

- a. Limited to those authorized by Ct order, statute, or rule

[§_54.25\(2\)\(d\)3.](#)

- Guardian must make decisions based on considerations of “least possible restriction” on personal liberty and exercise of constitutional and statutory rights; ward's previously and currently stated preferences; and sufficiency of ward's estate to pay for the needed services

[§_54.25\(2\)\(b\)](#)

- b. Ward who is determined incompetent retains, i.e., never loses, specific rights

- See [GA 1, Sec. 10.B.3\)b.](#), for list of rights under [§_54.25\(2\)\(b\)](#)

[§_54.25\(2\)\(c\)](#)

- c. Ward retains certain rights unless removed by Ct

- See [GA 1, Sec. 10.B.3\)c.](#), for list of rights under [§_54.25\(2\)\(c\)](#)

[§_54.25\(2\)\(d\)](#)

d. Once authorized, guardian may exercise specified powers without Ct approval

- See [GA 1, Sec. 10.B.3\)d.](#)

e. Guardian of person cannot make permanent protective placement for ward, EXCEPT

[§_55.055\(1\)\(a\)](#)

Agnes T v Milw Cty (In re Gdnship of Agnes T)

[179 Wis. 2d 363](#)

(Ct. App. 1993)

aff'd [189 Wis. 2d 520](#)

(1995)

- To foster home, group home, or community-based residential facility licensed for fewer than 16 beds

— If least restrictive environment consistent with ward's needs

[§_55.055\(1\)\(b\)](#)

- To nursing home for recuperation, for up to 60 days (with possible extension), if ward in need of recuperative care or unable to provide for own care or safety so as to create serious risk of substantial harm to self or others
- Emergency protective placement under [§_55.135](#)

[§_55.055\(4\)](#)

[§_155.20\(2\)\(b\)](#)

- Admission to health-care facility by health-care agent and terms of PAHCI not a protective placement under [Ch 55](#)

[§_55.15\(1\)](#)

St ex rel Watts

v Combined Cmty

Servs Bd

[122 Wis. 2d 65](#) (1985)

f. Guardian cannot authorize transfer of ward to mental hospital

Lausier v Pescinski

(Gdnship of Pescinski)

[67 Wis. 2d 4](#) (1975)

g. Neither guardian nor Ct may exercise “substituted judgment”

- No authorization allowed for medical procedures (e.g., kidney transplant) that are of no benefit to ward

Lenz v LE Phillips
Career Dev Ctr
(In re Gdnship of LW)
[167 Wis. 2d 53](#) (1992)
 See also *Cruzan v*
Director, MO
Dept of Health
[110 S. Ct. 2841](#) (1990)

h. Guardian may withdraw life-sustaining medical treatment without Ct approval

- When ward in persistent vegetative state, AND
- When guardian determines it in best interest of ward

— If there is a clear statement of ward's desires, it is in best interests of ward to honor those wishes

- Guardian should consider opinion of "bioethics" committee and next of kin

Recommendation

- Because [Ch 54](#) is silent on this issue, Ct approval is recommended if conflict of interest exists or objection is raised

[§_54.25\(2\)\(d\)2.ab.](#)

i. Guardian for person may consent to psychotropic medication on behalf of ward if ward does not protest

[§_55.14\(9\)](#)

- If ward substantially fails to comply with involuntary medication order, upon joint sworn statement of guardian and director and a finding by clear and convincing evidence of substantial noncompliance, Ct may authorize guardian to consent to forcible medications and authorize sheriff or other law enforcement agency to take custody of ward and transport

10. Review of Guardianship

[§_54.64](#)

A. An adult ward, a person acting on ward's behalf, or guardian may petition for review

- [§ 54.64\(2\)](#)
- Claus v Lindemann*
(*Gdnship of Claus*)
[45 Wis. 2d 179](#), 183–84
(1969)
- Colliton v Colliton*
(*In re Gdnship of Colliton*)
[41 Wis. 2d 487](#), 493
(1969)
- Recommendation
- [§ 54.64\(2\)\(a\)](#)
- [§ 54.64\(2\)\(a\)4.](#)
- [§ 54.64\(2\)\(b\)](#)
- [§ 54.64\(2\)\(a\)4.](#)
- [§ 54.64\(2\)\(c\)](#)
- [§ 54.64\(3\)](#)
- 1) No petition may be filed until 180 days after last hearing
 - 2) Ct may allow petition to be filed at any time if Ct determines that exigent circumstances, including new evidence, require review
 - 3) May petition to terminate because of defects in original proceeding or because of change in competency of ward
 - 4) On petition for termination, burden of proof on party alleging competency, by preponderance of the evidence
 - 5) When petition based on change, rather than defect in original proceedings, petition should be required to set forth facts showing prima facie basis for allegation of change
 - 6) Ct designates who is to receive notice and in what manner
 - 7) Ct must hold hearing on petition
 - a. Ward has right to be present
 - b. Ward has right to counsel
 - If indigent, Ct to appoint counsel at expense of Cty of jurisdiction
 - c. Ward has right to jury trial, if demanded
 - d. Judge must determine whether guardianship to be continued, modified, or terminated
 - Basis

— Does ward continue to meet standards for incompetency?

— Did ward change residency?

8) Expansion of guardianships is controlled by [§_54.63](#)

9) Reinstatement of right to possess firearm is controlled by [§_54.10\(3\)\(f\)2.b.](#)

GA 3: PROTECTIVE PLACEMENT AND SERVICES

1. Protective Service System

[§_55.001](#)

A. Policy

- 1) To allow an individual who is in need of protective placement or protective services the same rights as other citizens
- 2) To protect individuals from financial exploitation, abuse, neglect, and self-neglect
- 3) To assure all individuals the protective services and placement they need
- 4) To place the least possible restrictions on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, financial exploitation, neglect, and self-neglect

[§_55.01](#)

B. Definitions

[§_55.01\(2\)](#)

- 1) **Developmental disability**—means a disability attributable to an intellectual disability, cerebral palsy, epilepsy, autism, or another neurological condition closely related to an intellectual disability or requiring treatment similar to that required for individuals with an intellectual disability, which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for own care or custody, and

constitutes a substantial handicap to the afflicted individual. The term does not include dementia that is primarily caused by degenerative brain disorder

§_55.01(1e)

- 2) **Adult at risk**—means “any adult who has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation”

§_55.01(1v)

- 3) **Degenerative brain disorder**—means the loss or dysfunction of an individual’s brain cells to the extent that the individual is “substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs”

§_55.01(4m)

- 4) **Mental illness**—means mental disease to the extent that an afflicted person requires care, treatment, or custody for own welfare or welfare of others or of community

§_55.01(5)

- 5) **Other like incapacities**—means those conditions incurred at any age, which are the result of accident, organic brain damage, mental or physical disability or continued consumption or absorption of substances, producing a condition that substantially impairs an individual from adequately providing for the individual’s own care and custody

§_55.02(3)

C. Ct may request Cty Corp Counsel to assist in proceedings for protective services or placement

2. Protective Services

A. Ct may order protective services when

§_55.08(2)(a)

§_54.46(2)

- 1) There has been a determination of incompetency (guardian appointed under §_54.46(2)) or there is a minor who is alleged to have a developmental disability and on whose behalf a petition for a guardianship has been submitted

§_55.08(2)(b)

- 2) As a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others if protective services are not provided

NOTE: Requirements of petition, notice of hearing, evaluations, rights of individuals, and dispositions are the same as for protective placement.

B. Emergency services

§_55.13(1)

- 1) May be provided for up to 72 hours if there is reason to believe that if services were not provided, the individual or others would incur substantial risk of serious harm

§_55.13(2), (3)

- 2) If petition for emergency protective services is filed under §_55.075, Ct shall hold preliminary hearing within 72 hours, exclusive of Saturdays, Sundays, and legal holidays, to establish probable cause that criteria under §_55.08(2) are present. If Ct finds probable cause, emergency protective services can be ordered for up to 60 days pending final hearing on petition

§_55.13(4)

- 3) No forcible entry to premises to provide or investigate the need for emergency services may be made without Ct order authorizing entry and unless the person making the entry is accompanied by a sheriff, police officer, or fire fighter, except if [para. 4](#)) below applies

§_55.13(4), (5)

- 4) Forcible entry without a Ct order may be made by the sheriff, police officer, or fire fighter if it appears probable that substantial physical harm, irreparable injury, or death may occur to the individual and if the time required to obtain a Ct order would result in greater risk of physical harm to the individual. The person making the entry shall file a report to the Ct with 14 days after entry

3. Emergency Placement

A. Individual may be placed on emergency basis

§_55.135(1)

- 1) When, on the basis of personal observation of a sheriff, police officer, fire fighter, guardian, if any, or authorized representative of a Cty Dept or an agency with which it contracts under §_55.02(2), OR on a reliable report made by a person who identified self to one of the above persons
 - a. It appears probable that an individual is so totally incapable of providing for own care or custody as to create a substantial risk of serious physical harm to self or others if not immediately placed

- b. Risk is caused by developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities

- 2) Person in [para. 1](#)), who made observation or to whom report was made, may take custody and transport the individual to an appropriate medical or protective placement facility

[§_55.135\(1\), \(4\)](#)

B. Person making the emergency protective placement must file a statement containing the factual information concerning the placement and file a petition for placement under [§_55.075](#) and a petition for guardianship if the individual is not under guardianship

[§_55.075\(5\)\(a\)](#)

C. Venue in Cty of individual's residence

Recommendation

It may be necessary to hold preliminary hearing in Cty in which individual found; note that under [§_801.50\(1\)](#) a defect in venue does not affect validity of any order

[§_55.135\(4\)](#)

D. Ct must hold preliminary hearing within 72 hours after detention, excluding weekends and legal holidays

[§_757.69\(1\)\(h\)](#)

- 1) Hearing may be conducted by Ct Comm'r

Milw Cty v Louise M
(Commitment of Louise M)
[205 Wis. 2d 162](#) (1996)

- a. Ct's decision to grant review of Ct Commr's probable cause findings is discretionary under standards listed in *Louise M*

- b. Review of Ct Comm'r probable cause finding is de novo before Circuit Ct

- c. Review may be held any time before final hearing or trial in the matter

Kindcare, Inc v Judith G
(In re Protective
Placement, with Gdnship,
of Judith G)
[2002 WI App 36](#)
[250 Wis. 2d 817](#)

- 2) Unless probable cause hearing held within 72 hours after detention, Ct loses competence

Merely filing new petition does not start clock anew

- 3) Written and oral notice to detainee of time and place of hearing by person making emergency placement
- 4) Necessary findings
 - a. Probable cause to believe grounds for protective placement present, AND

Recommendation

- b. Probable cause to believe individual will suffer irreparable injury or death if not immediately placed

[§_55.135\(1\)](#)

- c. Individual will present substantial risk of serious physical harm to others as a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like capacities

5) Disposition

- a. If no probable cause found, dismiss

[§_55.135\(5\)](#)

- b. If probable cause found, Ct may order temporary placement for up to 30 days, or order protective services

St ex rel Sandra D

v Getto

(Gdnship of Sandra D)

[175 Wis. 2d 490](#)

(Ct. App. 1993)

- If final hearing is not held within 30 days, petition must be dismissed

[§_55.135\(5\)](#)

- Except that individual with developmental disability may be temporarily placed for up to 90 additional days

[§_55.135\(4\)](#)

- c. If protective placement or services not appropriate, may treat petition as one for commitment under [§_51.20](#) or [§_51.45\(13\)](#)

Note

- Subsequent notices and procedures must meet [Ch 51](#) requirements

4. Protective Placement Action

A. Family admission without a Ct order

[§_50.06\(2\)](#)

- 1) Individual may consent to admission directly from a hospital to a facility on behalf of an incapacitated person who does not have a valid PAHC and who has not been adjudged incompetent if all of the following apply

[§_50.06\(1\)](#)

NOTE: “Incapacitated” means unable to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage individual’s health-care decisions, including post-hospital care.

[§_50.06\(2\)\(a\)](#)

- a. Individual admitting has no less priority than another individual who disapproves of the admission

- See [§_50.06\(3\)](#) for priority listing

[§_50.06\(2\)\(am\)](#)

- b. No person listed in [§_50.06\(3\)](#) and who resides with the person proposed for admission disagrees with the proposed admission

[§_50.06\(2\)\(b\)](#)

- c. Individual for whom admission is sought is not diagnosed as developmentally disabled or as having mental illness at time of proposed admission

[§_50.06\(2\)\(d\)](#)

- d. Incapacitated individual does not verbally object or otherwise actively protest the admission

[§_50.06\(2\)\(c\)](#)

[§_54.44](#), [§_55.10](#)

- e. Petition for guardianship for individual under [§_54.34](#) and a petition under [§_55.075](#) for protective placement of the individual are filed before proposed admission—the petitions must be heard within 60 days after filing

[§_50.06\(5\)\(a\)](#)

- 2) Individual may make health-care decisions for incapacitated person and authorize health-care expenses until the earliest of:

§_50.06(5)(a)1.

- a. 60 days after admission of incapacitated individual to the facility

§_50.06(5)(a)2.

- b. Discharge of the incapacitated individual from the facility

§_50.06(5)(a)3.

- c. Appointment of a guardian

§_50.06(5)(b)

- 3) Individual may not authorize expenditures related to health care if the incapacitated individual has an agent under durable power of Atty, as defined in §_244.02(3), who may authorize expenditures related to health care

§_50.06(6)

- 4) If the incapacitated individual is in facility after 60 days and no guardian has been appointed, authority of the individual who consented to admission is extended 30 days for purpose of allowing facility to initiate discharge planning for incapacitated individual

§_55.055(4)

- 5) Admission under §_50.06 or by a PAHC is NOT a protective placement under [Ch 55](#)

For full discussion of PAHC, see [GA7](#), this volume

Agnes T v Milw Cty

(*Gdnship of Agnes T*)

[179 Wis. 2d 363](#)

(Ct. App. 1993)

aff'd, [189 Wis. 2d 520](#)

(1995)

- 6) If person voluntarily in nursing home, cannot leave person there if there is a guardianship. There must be a protective placement as well

B. Ct-ordered protective placement

1) Eligibility

§_55.06

- a. Placement of ward for primary purpose of providing care and custody

- Individual must have attained age of 18

— Petition may be initiated 6 months before ward attains age 18

— Except person alleged to have a developmental disability may receive placement upon attaining age 14

b. NO PLACEMENT may be ordered unless determination of incompetency in Wis

- Except in case of minor alleged to have a developmental disability, if there is a finding of need for protective placement

76 OAG 103

§_55.075(5)

§_49.001(6), §_51.40

2) Venue

a. In Cty of residence as determined under §_51.40—Cty of residency is Cty of responsibility

§_55.075(5)(bm)

- Dispute regarding residence is determined by Ct after notice to any potentially responsible or affected Cty —Ct may refer issue to DHS for determination under §_51.40(2)(g)

b. In Cty where individual is physically located under extraordinary circumstances

3) Petition

§_55.075(1)

a. May be filed by DHS, Cty Dept, agency, guardian, or interested person

§_55.075(2)

b. Must be based on petitioner's personal knowledge of individual to be placed and must state with particularity factual basis that individual meets standards specified in §_55.08(1)

§_55.075(3)

- c. Guardianship petition must be heard before ordering placement; if incompetency was found more than 12 months before filing the petition for protective placement, Ct must review incompetency finding

§_55.075(4)

- d. Ct shall award fees and costs in filing petition from assets of individual sought to be protectively placed after considering factors in §_55.075(4)(a)

4) Notice

§_55.09(1)

- a. To individual, by personal service at least 10 days before hearing date
- Person serving notice must return certificate to Judge verifying that petition delivered and complete contents of notice given

§_55.09(2)

- b. To others, by mail or by personal service at least 10 days before hearing date, including, if known or ascertainable

- GAL
- Atty
- Guardian, if any
- Presumptive adult heirs
- Persons having physical custody of individual
- Any governmental or private body or group from whom individual receiving aid
- Agent under an activated PAHC

- Cty Dept
- Cty Dept in Cty of residence if it participates in program under §_46.278 (or to DHS if contractor provisions under §_46.279(4m) apply) and if individual has developmental disability and may be placed in intermediate or nursing facility. Hearing should be scheduled far enough in advance to allow Cty Dept statutory time period of 120 days to prepare placement plan under §_46.279(4)
- Any other persons or entities Ct may require
- DHS, if individual may be placed in center for developmentally disabled

Recommendation

— If such placement not anticipated in advance, make interim disposition and notify DHS before transfer to center, or adjourn disposition to allow 10 days' notice

§_55.09(1)

- c. Notice to include names of all petitioners

§_55.11

5) Evaluation

- a. Comprehensive evaluation of individual to be made

- Ct may utilize multidisciplinary resources for evaluation (M-Team)

§_55.11(1)(c)

- Evaluation to recommend placement consistent with the requirements of §_55.12(3), (4), and (5)

§_55.11(3)

- Evaluation to be provided to guardian, agent under a PAHC, GAL, and individual or Atty at least 96 hours before hearing to determine placement

§_55.11(5)

- b. Ct must request DHS statement if considering placement in center for developmentally disabled

- To state whether placement appropriate for individual's needs and if consistent with purpose of center under [§_51.06\(1\)](#)
- To be submitted as oral or written testimony

[§_55.11\(6\)](#)

- c. Ct must request statement from Cty Dept in Cty of residence (or from DHS if [§_46.279\(4m\)](#) applies) if Ct considering placing person with developmental disability in intermediate facility or nursing facility

- To state whether individual's needs could be met in noninstitutional setting

[§_55.11\(2\)](#)

- d. Individual has right to secure relevant independent medical or psychological examination and to present a report or evaluator's personal testimony as evidence

- At request of individual, or anyone on individual's behalf
- At individual's own expense, or if indigent, at expense of Cty where petition filed

[§_54.40](#), [§_54.42](#)[§_54.44](#), [§_54.46](#)

6) GAL

- a. Ct to appoint GAL, who must be Atty

- The duties and responsibilities of the GAL are the same as under a guardianship. (See [GA 2, Sec. 3](#))

[§_55.10\(4\)\(a\)](#)

7) Right to counsel

- a. Ct to require representation by full legal counsel if

- Petition alleges individual is not competent to refuse psychotropic medications

- Individual requests counsel at least 72 hours before the hearing
 - GAL or any other person states that individual opposed to petition
- b. If counsel requested but individual unable to obtain counsel, Ct to refer to SPD for appointment of counsel under §_55.105

§_55.105(1)

- In any [Ch 55](#) proceeding in which an adult has right to counsel, Ct must refer that person as soon as practicable to SPD, which must appoint counsel under §_977.08 without determining indigency

5. Protective Placement Hearing Procedure

§_55.10(1)

A. Petition must be heard within 60 days after filing unless an extension of up to 45 days is requested by petitioner, GAL, individual, or Cty Dept

§_55.10(2)

B. Attendance

*Racine Cty v PB (In re
Gdnship & Protective
Placement of PB)*
[2022 WI App 62](#)
[405 Wis. 2d 383](#)

- 1) Petitioner shall ensure that the individual attends the hearing, with “to attend” meaning physically present in person
- 2) Attendance may be waived by Ct if GAL, after personal interview, certifies in writing specific reasons why individual is unable to attend. GAL shall consider individual’s ability to understand and meaningfully participate, the effect of attendance on individual’s physical or psychological health in relation to the importance of the proceeding, and individual’s expressed desires

§_55.10(2)

- 3) If individual unable to attend because of physical inaccessibility or lack of transportation, Ct must hold hearing where individual may attend if requested by individual, GAL, counsel, or other interested persons

§_55.10(4)(b)

- 4) GAL must be present at all hearings if individual does not have full legal counsel

- a. Ct may excuse personal appearance by GAL based on information contained in written report by GAL to Ct

Jefferson Cty v Joseph S
(In re Protective
Placement with Gdnship
of Joseph S)
[2010 WI App 160](#)
[330 Wis. 2d 737](#)

- b. Ct may lose competency to proceed if disruptive individual is removed from hearing without requisite warning

§_55.10(4)(c)

C. Right to jury trial if demanded by individual, Atty, or GAL

§_756.06

- 1) 6-person jury unless party requests a greater number, not to exceed 12; Ct on own motion may require up to 12 jurors

Milwaukee Cty v
Mary F-R
[2013 WI 92](#)
[351 Wis. 2d 273](#)

6-person juries are constitutional as well as 5/6 verdicts

[Wis JI-Cy 7060](#)

- 2) Jury must determine whether elements for protective placement present; nature and duration of placement are judicial determinations

§_55.10(4)(c)

D. Right to present and cross-examine witnesses

- 1) Individual, Atty, or GAL has right to present and cross-examine witnesses
- 2) See [GA 2, Sec. 7](#)

6. Elements to Be Proved at Protective Placement Hearing

§_55.08(1)(b)

A. Individual is incompetent

§_55.075(3)

- 1) Petition for guardianship must be heard before ordering protective placement

§_55.075(3)

- 2) If incompetency determined more than 12 months before filing the petition for placement, Ct must review the finding

§_55.08(1)(a)

B. AND individual has primary need for residential care and custody

*Jackson Cty Dept of
Health & Human Servs v
Susan H (In re Protective
Placement of Susan H)*
[2010 WI App 82](#)
[326 Wis. 2d 246](#)

NOTE: The meaning of “custody” does not require a finding of involuntariness.

§_55.08(1)(c)

C. AND individual so totally incapable of providing for own care or custody as to create substantial risk of serious harm to self or others

- 1) Incapability to provide for own care must result from developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities

§_55.08(1)(c)

- 2) Serious harm may be occasioned by overt acts or acts of omission

§_55.08(1)(d)

D. AND disability permanent or likely to be permanent

*Zander v
Cty of Eau Claire
(Gdnship & Protective
Placement of Shaw)*
[87 Wis. 2d 503](#), 515
(Ct. App. 1979)

Ct should not find the condition permanent unless the person has failed to respond to all available treatment procedures and, in the opinion of competent medical authorities, is not reasonably likely to respond in the future

§_55.10(4)(d)

E. Findings, by clear and convincing evidence, that statutory elements for protective placement exist

*Zander v
Cty of Eau Claire
(Gdnship & Protective*

Placement of Shaw)

[87 Wis. 2d 503](#)

(Ct. App. 1979)

- 1) Findings must be specific on each element and based on evidence presented at hearing

[§_55.12\(10\)](#)

- 2) For determination whether to withdraw right to possess firearm, see [MH 1, Sec. 9.D.](#)

7. Disposition

A. If placement required

[§_55.12\(1\)](#)

- 1) Ct shall order Cty Dept or agency with which it contracts under [§_55.02\(2\)](#) to provide protective placement to the individual

[§_55.12\(3\), \(4\)](#)

- 2) Placement to be in least restrictive environment and manner consistent with needs of person and level of supervision needed, but must balance in addition the reasonableness of placement, given:

[§_55.12\(4\)](#)

- a. Costs and actual benefits in level of functioning to be realized by individual

[§_55.12\(4\)](#)

- b. Limits of available funds, and projected number of other persons who will need placement paid for by those funds

Dunn Cty v Judy K

(Gdnship of Judy K)

[2002 WI 87](#)

[254 Wis. 2d 383](#)

NOTE: If Cty refuses to place in least restrictive setting based on funding limitations, Cty must make affirmative showing of a good-faith, reasonable effort to find appropriate placement and secure funding for it.

[§_55.12\(2\)](#)

- 3) Placement MAY NOT be in unit for acutely mentally ill

- a. If mental institution has units not for the acutely mentally ill, such institutional placement not prohibited

- b. To place in unit for acutely mentally ill, requirements of §_51.15 (emergency detention) or §_51.20 (involuntary commitment) must be met

- See [Sec. 8](#) below for transfer requirements

§_55.12(2)

- 4) Placement MAY NOT be in locked unit unless Ct makes specific finding as to need for such action

§_55.12(6)

- 5) Placement of person with developmental disability MAY NOT be in intermediate care facility or nursing facility unless Ct finds that such placement is most integrated setting that enables the individual to interact with persons without developmental disabilities to fullest extent possible

§_55.03(1)

- 6) An agency is prohibited from serving both as guardian for a person and as the provider of protective services or protective placement for the person

B. See [MH 5](#) for rights of persons protectively placed

8. Transfers Between Placement Facilities

§_55.15(1)

- A. Individual under a placement order may be transferred between protective placement units, protective placement facilities, and from protective placement unit to a medical facility**

§_55.15(2)

- B. Transfers may be made by guardian, Cty Dept, or agency with which Cty contracts**

§_55.15(3), (4)

- C. Except in cases of emergencies, transfer cannot occur without guardian's written consent and, if transfer will be more costly to Cty, without Cty's written consent**

§_55.15(5)(a)

- D. Notice of nonemergency transfers shall be given 10 days before transfer to Ct and to persons and entities who could have initiated transfer and shall include notice of right to Ct hearing to review transfer**

§_55.15(5)(b)

- E. Emergency transfer may be made without written consent of the guardian and without notice to other parties. Notice of transfer must be given immediately after transfer to other parties and to Ct**

F. Review hearing procedure

§_55.15(6)

- 1) Individual under placement, Atty, guardian, or other interested party may file a petition specifying reasons for objecting to the transfer

§_55.15(7)

- 2) Ct shall hold a hearing within 10 days after filing of petition, appoint GAL, and refer to SPD under §_55.105 for appointment of counsel for the individual if requested

§_55.15(7)(d)

- 3) Individual, individual's Atty, GAL, and guardian have right to attend the hearing and to present and cross-examine witnesses

§_55.15(8)

- 4) At hearing on objection to transfer, Ct shall consider:
 - a. Whether statutory requirements have been met
 - b. Whether transfer is least restrictive to meet individual's needs
 - c. Whether protective placement is in the best interests of the individual

§_55.15(9)

- 5) After the hearing, Ct may approve transfer, deny transfer, or terminate protective placement if individual no longer meets standards for placement

9. Annual Review of Placements (*Watts* Hearings)

§_55.18

St ex rel Watts v
Combined Cmty Servs Bd
[122 Wis. 2d 65](#) (1985)

A. Annual review of each protective placement required

§_757.69(1)(h)

- 1) By Judge or Ct Comm'r

Cty of Dunn v Goldie H
(In re Gdnship &

*Protective Placement of
Goldie H)*
[2001 WI 102](#)
[245 Wis. 2d 538](#)

- 2) Ct must hold either full-due-process or summary hearing

[§_55.18\(1\)\(a\)](#)

B. Cty Dept must review individual's status at least annually

- 1) Ct may order more frequent review of placement

- 2) Review must include, in writing,

- a. Evaluation of individual's physical, mental, and social condition

[§_55.18\(1\)\(a\)1.b. & d.](#)

- b. Availability of community services to support the individual and cost of services

[§_55.18\(1\)\(a\)1.f., g.](#)

- c. Comments made during review process by individual, guardian, or service providers

[§_55.18\(1\)\(a\)1.e.](#)

- d. Any recommendation for discharge or placement in less restrictive environment

[§_55.18\(1\)\(ar\)](#)

- e. If ward has developmental disability and is placed in intermediate or nursing facility, Cty Dept (or DHS contractor) shall develop plan under [§_46.279\(4\)](#) and Ct shall order that ward be transferred to noninstitutional community setting in accordance with plan unless Ct finds that placement in intermediate or nursing facility is most integrated setting appropriate to ward's needs, taking into account information presented by all affected parties

[§_55.18\(1\)\(a\)3.](#)

- 3) Review made part of individual's permanent file and copy provided to Ct, individual, guardian, and agent under an activated PAHC

[§_55.18\(1\)\(a\)2.](#)

- 4) Cty must file petition for annual review with Ct that ordered placement

[§_55.18\(2\)](#)

*St ex rel Watts v
Combined Cmty Servs Bd*
[122 Wis. 2d 65](#) (1985)

C. GAL must be appointed, who must meet with individual, contact guardian, and report to Ct within 30 days after appointment

§_55.18(3)

D. Based on review of Cty report, GAL report, and guardian's report under [Ch 54](#), Ct shall

§_55.18(3)(d)

1) Hold a summary hearing or a due-process hearing (if [para. 5](#) below applies). A summary hearing

a. Is on the record

§_753.24(2m)

b. Is held in open Ct or by telephone or videoconference

c. Is not an evidentiary hearing

d. Does not require individual's attendance

§_55.18(3)(b)

2) Order evaluation of individual's physical, mental, and social condition and service needs, if

a. Report by Cty is not timely

b. Based on GAL's report, Ct determines that it is necessary

c. Individual, guardian, or GAL requests evaluation

§_55.18(3)(br)

3) Order Cty to obtain additional information with respect to the individual

§_55.18(3)(c)

4) Refer to SPD for appointment of legal counsel under [§_55.105](#) if requested by individual, the guardian, or GAL or if the Ct determines counsel is necessary

§_55.18(3)(d)

5) Hold a due-process hearing meeting requirements of [§_55.10\(2\)–\(4\)](#) if

- a. Individual, guardian, or GAL requests hearing, or
- b. GAL report indicates that the individual is objecting to the placement, the individual is not in the least restrictive placement, or the individual no longer meets the standards for placement

[§_55.18\(3\)\(e\)](#)

6) After a summary or due-process hearing, Ct shall order

- a. Continuation of the placement if Ct finds that the individual continues to meet the standards under [§_55.08\(1\)](#), including that the individual is still incompetent and in need of a guardian, or
- b. Transfer to a less restrictive placement if individual still meets standards for placement, or
- c. Termination of placement if individual no longer meets standards

[§_55.18\(3\)\(e\)1., 2.](#)

NOTE: An order under [para. a.](#) or [para. b.](#) above shall include the information relied on as a basis for the order.

*Jackson Cty Dept of
Health & Human Servs v
Susan H (In re Protective
Placement of Susan H)*
[2010 WI App 82](#)
[326 Wis. 2d 246](#)

NOTE: Placement should not be terminated merely because the placement is voluntary, as long as the standards for protective placement are met.

[§_55.16](#)

[§_55.17](#)

10. Modification or Termination of Protective Placement and Services Orders

[§_55.16\(2\)](#)

[§_55.17\(1\)](#)

A. Individual, guardian, GAL, legal counsel, Cty Dept, or other interested party may file a petition to modify or terminate an order of protective placement or service

[§_55.16\(3\)](#)

[§_55.17\(2\)](#)

B. Hearing on the petition shall be within 21 days after filing, except that hearing is not necessary if within the previous 6 months there was a hearing on services, placement, or transfer. The hearing shall be subject to §_55.10

§_55.16(4)

§_55.17(3)

C. After the hearing on modification or termination of protective placement, the Ct shall order one of the following

- 1) Continuation of the placement
- 2) Transfer to a less restrictive placement if individual still meets standards for placement
- 3) Termination of placement if individual no longer meets the standards

*Jackson Cty Dept of
Health & Human Servs v
Susan H (In re Protective
Placement of Susan H)*

[2010 WI App 82](#)

[326 Wis. 2d 246](#)

NOTE: Placement should not be terminated merely because the placement is voluntary, as long as the standards for protective placement are met.

§_55.17(3)(c)

- 4) If protective placement is terminated, Ct shall order protective services if the individual meets the standards under §_55.08(2)

§_55.16(4)

§_55.17(3)

NOTE: The order shall include the information relied on as a basis for the order.

§_55.16(5)

§_55.17(4)

D. After hearing on modification or termination of protective services, except order under §_55.14 for involuntary administration of psychotropic medications, Ct shall order

- 1) Continuation of the services
- 2) Provision of services in a less restrictive manner

3) Termination of services if the individual no longer meets the standards

NOTE: The order shall include the information relied on as a basis for the order.

11. Psychotropic Medications

§_55.14(1)

A. Definitions

§_55.14(1)(a)

- 1) “Involuntary administration of psychotropic medication” means any of the following:
 - a. Placing psychotropic medication in an individual’s food or drink with knowledge that the individual protests receipt of the psychotropic medication
 - b. Forcibly restraining an individual to enable administration of psychotropic medication
 - c. Requiring an individual to take psychotropic medication as a condition of receiving privileges or benefits

§_55.14(1)(b)

- 2) “Not competent to refuse psychotropic medication” means that, for an individual with developmental disability or as a result of degenerative brain disorder, serious and persistent mental illness, or other like incapacities, and after the advantages and disadvantages of and alternatives to accepting the particular psychotropic medication have been explained to an individual, one of the following is true:
 - a. Individual is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment and the alternatives to accepting treatment
 - b. Individual is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives “to his or her condition in order to make an informed choice as to whether to accept or refuse psychotropic medication”

§_55.14(1)(c)

- 3) “Protest” means make more than one discernible negative response, other than mere silence, to the offer of, recommendation for, or other proffering of voluntary receipt of psychotropic medication. “Protest” does not mean a discernible negative response to a proposed method of administration of the psychotropic medication

§_55.14(1)(d)

- 4) “Psychotropic medication” means a prescription drug, as defined in §_450.01(20), that is used to treat or manage a psychiatric symptom or challenging behavior

§_55.14(3)

B. Petition must meet all the requirements of §_55.075 and contain the following allegations:

- 1) After having been prescribed the medications, the individual, who is alleged not competent to refuse the medications, has refused to take the medications or voluntarily administering the medication is not feasible or in the best interest of the individual
- 2) The individual will likely respond positively to the medication and it will improve the condition of the individual

§_55.14(3)(e)

- 3) Unless psychotropic medication is administered involuntarily, individual will incur substantial probability of physical harm, impairment, injury, or debilitation or will present substantial probability of physical harm to others. Substantial probability of physical harm, impairment, injury, or debilitation shall be evidenced by one of the following:
 - a. Individual’s history of at least 2 episodes, one of which has occurred within previous 24 months, that indicate pattern of overt activity, attempts, threats to act, or omissions that resulted from individual’s failure to participate in treatment, including psychotropic medication, and that resulted in finding of probable cause for commitment under §_51.20(7), settlement agreement approved by Ct under §_51.20(8)(bg), or commitment ordered under §_51.20(13)
 - b. Evidence that individual meets one of the dangerousness criteria set forth in §_51.20(1)(a)2.a.–e.

§_55.14(4)

- 4) Petition must include written statement from doctor who has personal knowledge of individual

§_55.14(7)

C. Hearing on the petition must be within 30 days after filing and must meet the requirements of §_55.105

§_55.14(5)–(6)

D. Ct must appoint GAL and counsel for individual and order independent medical or psychological examination relevant to the issues

§_55.14(8)

E. If allegations are proved by clear and convincing evidence, Ct may issue order authorizing guardian to consent to the involuntary administration of medications and may order the involuntary administration of the

medication

§_55.14(8)(a)

F. If order for medication is issued, Ct must order a treatment plan be developed for individual to be approved by guardian and Ct

§_55.14(8)(b)

G. Ct must order individual to comply with treatment plan and, if there is noncompliance,

- 1) Guardian may consent to involuntary administration of medication by Ct-approved method

§_55.14(9)

- 2) Based on a sworn statement prepared by Corp Counsel of individual's failure to comply with treatment plan, Ct may order sheriff or other law enforcement agency to take individual into custody and transport individual to an appropriate facility for administration of medication

§_55.19

H. Annual reviews

§_55.19(1)

- 1) Cty Dept must prepare and file with Ct annual report on the individual and a petition for review

§_55.19(2)

- 2) Upon Cty Dept's filing of the petition for review, Ct must appoint a GAL

§_55.19(3)

I. Based on review of Cty report and GAL report, Ct shall

§_55.19(3)(d)

- 1) Hold a hearing that meets requirements of §_55.10, if required under [para. 5](#)) below, or hold a summary hearing that is

- a. On the record

§_753.24(2m)

- b. Held in Ct or by telephone or videoconference

§_55.19(3)(b)

- 2) Order an evaluation of the physical, mental, and social condition of the individual if
 - a. Report by Cty is not timely
 - b. Based on GAL's report, Ct determines that it is in the best interest of the individual
 - c. Individual, guardian, or GAL requests evaluation

§_55.19(3)(br)

- 3) Order Cty to obtain additional information with respect to the individual

§_55.19(3)(c)

- 4) Refer to SPD for appointment of legal counsel under §_55.105 if requested by individual, guardian, or GAL, or if Ct determines counsel is necessary

§_55.19(3)(d)

- 5) Hold a due-process hearing meeting the requirements of §_55.10 if
 - a. Individual, guardian, or GAL requests hearing, or
 - b. GAL report indicates that individual is objecting to medication order or individual no longer meets standards for order under §_55.14(8)

§_55.19(3)(e)

- 6) After a summary or due-process hearing, the Ct shall order
 - a. Continuation of medication order
 - b. Modification of medication order or treatment plan if individual still meets standards under §_55.14(8); modification of treatment plan must be approved by the guardian
 - c. Termination of the medication order if the individual no longer meets the standards under §_55.14(8)

NOTE: The order under [para. a.](#) or [b.](#) above shall include the information relied on as a basis for the order.

12. For Discussion of Rights and Records of Protectively Placed Persons, See [MH 5](#)

GA 4: GUARDIANSHIP OF ESTATE OF MINOR

1. Procedure

[§_54.01\(20\)](#)

A. Minor—Definition

A person who has not attained the age of 18 years

B. Guardian for estate of minor not required if

[§_54.12\(1\)](#)

[§_867.03\(1g\)](#)

- 1) Minor entitled to possession of personal property of \$50,000 or less, AND, when pending proceeding involving property, Ct orders money
 - a. Deposited in savings account in insured bank, savings and loan, credit union
 - b. Invested in interest-bearing obligations of US
 - c. Paid to minor's parent or person having actual custody of minor
 - d. Paid to minor
 - e. Paid to agent under DPA
 - f. Paid to trustee of any trust created for minor's benefit

§_54.12(2)
§_867.03(1g)

- 2) Minor entitled to possession of personal property of \$50,000 or less from estate under informal administration, and personal representative, with approval of register in probate or GAL, may take any action described under [para. 1](#)) above

§_54.12(3)

- 3) Ct orders payment to custodian for minor under uniform gifts to minors act or uniform transfers to minors act of any other state

§_54.10(3)(c)3.

- 4) Roll-over into existing trust
- 5) See Settlements in [Civil Benchbook, CV 40](#)

C. Jurisdiction and venue

§_54.30

- 1) In Circuit Ct when
 - a. Resident of Cty
 - b. Physically present in Cty

§_822.02(4)
PC v CC (In Int of AEH)
[161 Wis. 2d 277](#) (1991)

- 2) Proceeding for guardianship of minor is custody proceeding governed by Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), [Ch 822](#)

D. Petition

§_54.38(2)

- 1) Upon filing of petition, Ct to review and order notice of time and place of hearing

§_54.34

- 2) See [GA 1](#) for petition requirements

E. Notice

§_54.38(2), (3)

- 1) 10 days before hearing by personal service or mail to minor if over 14, to spouse, to parents unless parental rights terminated, and to person or entity having legal or actual custody

§_54.38(1)

- 2) Failure to serve is jurisdictional unless service waived by interested person or by Ct

F. Appointment of GAL or counsel

§_54.40

- 1) Ct must appoint GAL for proposed ward and, if requested, advocacy counsel

§_48.23(4), §_48.235(8)

- 2) Reasonable compensation for GAL to be paid by minor's parents or Cty of venue

Note: [Sec. 54.74](#) does not mention parental responsibility; [§_54.46\(3\)\(b\)](#) and (c) require petitioner to pay if guardian is not appointed.

2. Hearing

§_54.44(4)(b)

Note: Minor ward is not required to appear.

A. Findings

§_54.44(2)

- 1) Elements proved by clear and convincing evidence
- 2) Person under age 18

§_54.30(2)

- 3) Proposed ward is resident of Cty or is physically present in Cty

§_54.46(6)

- 4) Minor is proper subject for guardianship. Married minor not proper subject for guardianship of person

§_54.44(6)

- 5) Suitability of proposed guardian

B. Appointment of guardian

§_54.15(5)

Barstad v Frazier

[118 Wis. 2d 549](#), 568

(1984)

But see Robin K v

Lamanda M

(Gdnship of James DK)

[2006 WI 68](#)

[291 Wis. 2d 333](#)

- 1) Parent appointed unless parent unsuitable or unwilling

§_54.15(5)

Ct must consider minor's objection

§_54.15(4)(b)

- 2) Minor may nominate in writing if over 14 years old, but Ct may dispense with right of nomination for good reasons

§_54.15(4)(c)

- 3) If neither parent suitable and willing, Ct may appoint nominee of minor

§_54.15(6)

- 4) Parent may nominate by will, subject to rights of surviving parent

- a. Parent may nominate guardian of estate of parent's minor child by will and waive bond

- b. Parent may nominate successor guardian of estate of any of parent's minor children in need of guardianship

Brezinski v Barkholtz (In

re Gdnship of Schmidt)

[71 Wis. 2d 317](#) (1976)

- 5) In all cases, Ct must determine whether nominated guardian is suitable

When parent not suitable, Ct must determine whether appointment of nominee would prejudice rights of parent

§_54.15(7)

- 6) Ct may appoint corporate guardian only if no suitable individual guardian available

C. Guardian's bond

§_54.46(4)

- 1) On appointment of guardian of estate, Ct may require bond
 - a. Ct may waive bond requirement at any time or if requested in will that contains nomination
 - Unless required under Uniform Veterans Guardianship Act

§_54.46(4)(b)3.

- b. If funds in guardian's possession total less than \$100,000, Ct may waive bond and order direct deposit in insured financial institution, payable only on Ct order

3. Duties of Guardian of Estate

See [GA 1, Sec. 10.C.](#)

4. Termination of Guardianship

A. Guardianship of estate of minor terminates when

§_54.64(4)(c)

- 1) Minor attains age 18

§_54.64(4)(d)

§_54.46(6)

- 2) Minor lawfully marries and Ct approves termination

§_54.64(4)(e)

3) Minor dies

§_54.66(4)

§_867.03(1g)

Unless minor dies leaving estate under \$50,000 that can be settled summarily by guardian

§_54.64(5)

- 4) Estate of minor is below \$50,000 and reduced to point at which it is to advantage of minor to dispense with guardianship

§_54.68

B. Guardian may be removed for cause

See [GA 1, Sec. 11](#)

5. For Guardianship of the Person of a Minor, See Juvenile Benchbook

GA 5: GUARDIANSHIP OF SPENDTHRIFT

1. Definitions

§_54.01(10)

- A. “Guardian”—“[A] person appointed by a Ct under §_54.10 to manage the income and assets ... of ... a spendthrift”

§_54.01(31)

- B. “Spendthrift”—“[A] person who, because of the use of alcohol or other drugs or because of gambling or other wasteful course of conduct, is unable to manage effectively his or her financial affairs or is likely to affect the health, life, or property of himself, herself, or others so as to endanger his or her support and the support of his or her dependents, if any, or expose the public to responsibility for his or her support”

2. Procedure

- A. See [GA 1](#)

B. Petition

§_54.34

- 1) May be filed by any person

See also [GA 1, Sec. 5](#), for procedures for foreign guardianships

- 2) Contents

- a. See [GA 1, Sec. 4.B](#).

- b. Nature of incapacity

§_54.34(1)(b)

- Petition must contain specification of spendthrift habits

C. Notice

§_54.38(2)

Served at least 10 days before hearing personally on proposed ward, and personally or by certified or registered mail on current guardians and by mail on all interested persons

D. Hearing

§_54.10(2)(a)

- 1) Ct may appoint guardian of the estate for individual if Ct finds by clear and convincing evidence that individual is aged at least 18 years and is a spendthrift

§_54.10(2)(b)

- 2) In appointing a guardian of the estate under [§_54.10\(2\)](#) or determining what powers are appropriate for the guardian of the estate to exercise under [§_54.18](#) or [§_54.20](#), Ct shall consider all of the following:
 - a. GAL's report, as required in [§_54.40\(4\)](#)

- b. Medical or psychological report provided under [§_54.36\(1\)](#) and any additional medical, psychological, or other evaluation ordered by Ct under [§_54.40\(4\)\(e\)](#) or offered by a party and received by Ct
- c. Whether other reliable resources are available to provide for the individual's personal needs or property management, and whether appointment of a guardian of the estate is least restrictive means to provide for individual's need for substitute decision maker
- d. Preferences, desires, and values of the individual with regard to personal needs or property management
- e. Nature and extent of individual's care and treatment needs and property and financial affairs
- f. Whether the individual's situation places individual at risk of abuse, exploitation, neglect, or violation of rights
- g. Extent of demands placed on individual by individual's personal needs and by nature and extent of individual's property and financial affairs
- h. Any mental disability, alcoholism, or other drug dependence of the individual and prognosis of mental disability, alcoholism, or other drug dependence
- i. Whether effect on individual's evaluative capacity is likely to be temporary or long term, and whether effect may be ameliorated by appropriate treatment
- j. Whether any alternatives to guardianship, including supported decision-making under [Ch 52](#), have been attempted, and, if applicable, degree to which attempted, length of time attempted, and whether they attempted in a manner sufficient to demonstrate that alternatives to guardianship are insufficient to enable individual to adequately exercise right(s) in question
- k. Other relevant evidence

[§_54.10\(2\)\(c\)](#)

- 3) Before appointing a guardian of the estate under [§_54.10\(2\)](#) or determining what powers are appropriate for the guardian of the estate to exercise under [§_54.18](#) or [§_54.20](#), Ct shall determine whether additional medical, psychological, social, vocational, or educational evaluation is necessary for the Ct to make an informed decision respecting the individual

[§_54.10\(2\)\(d\)](#)

- 4) In appointing a guardian of the estate under [§_54.10\(2\)](#), Ct shall authorize the guardian of the estate to exercise only those powers under [§_54.18](#) and [§_54.20](#) that are necessary to provide for individual's personal needs and property management and to exercise the powers in manner that is appropriate to the individual and that constitutes least restrictive form of intervention

E. Findings

- 1) Determine whether person proper subject for guardianship

[§_54.10\(2\)\(a\)](#)

May only be guardianship of estate

[§_54.44\(6\)](#)

- 2) Determine suitability of guardian

[§_54.46\(2\)\(a\)](#)

- 3) Appoint one or more guardians; unless otherwise ordered by Ct, all co-guardians must concur

[§_54.46\(4\)](#)

- 4) Determine amount of bond, if any, and include in order

[SCR 21.17](#)

[SCR 22.35](#)

- 5) If person is Atty, Ct must immediately file a copy of the findings and order with clerk of Supreme Ct and Director of the Office of Lawyer Regulation. Supreme Ct must immediately order Atty to show cause why Atty's license to practice law should not be suspended by reason of medical incapacity

3. Duties of Spendthrift Guardian

A. General duties

See [GA 1, Sec. 10.C.](#)

4. Review of and Removal of Guardian

See [GA 1, Sec. 11](#)

5. Termination of Guardianship

A. Guardianship terminated when

[§_54.64\(4\)\(a\)](#)

- 1) Ct adjudicates individual formerly found to be a spendthrift to be capable of handling the individual's income and assets

- 2) Ward dies

[§_54.64\(4\)\(e\)](#)

[§_54.66\(4\)](#)

[§_867.03\(1g\)](#)

If ward leaves estate that is less than \$50,000 and can be settled summarily under [§_867.01](#), Ct may approve settlement and distribution by guardian without appointing personal representative

[§_54.64\(5\)](#)

[§_867.03\(1g\)](#)

- 3) Estate of ward below \$50,000 and reduced to point at which it is to ward's advantage to dispense with guardianship

[§_54.12\(1\)](#)

Ct may authorize disposition of remaining assets as provided by [§_54.12\(1\)](#)

[§_54.64\(4\)\(b\)](#)

- 4) Ward changes residence to another state and that state appoints guardian

B. For inventory and accounting requirements, see [GA 1, Sec. 10.C.](#)

GA 6: CONSERVATORSHIP

1. Appointment Proceedings

[§_54.76\(1\)](#)

A. Purely voluntary proceeding

Initiated by any adult resident who is unwilling or believes self unable to properly manage own assets or income

B. Venue in Cty of residence**C. Ct must fix time and place for hearing**

Ct may direct whether, to whom, and in what manner notice of hearing must be given

[§_54.76\(2\)](#)

D. Hearing

1) Applicant personally examined by Ct to determine that

- a. Applicant desires conservator
- b. Proposed conservator suitable

2) Ct may appoint conservator and issue letters of conservatorship upon filing of bond amount determined by Ct

[§_54.76\]\(2\), \(3n\)](#)

3) Ct may appoint standby conservator

[§_54.76\(5\)](#)

E. Appointment of conservator NOT evidence of competency or incompetency of conservatee**2. Duties and Powers of Conservator**

[§_54.76\(3\);](#)
see [GA 1, Sec. 10.C.](#)

A. Has all powers and duties of guardian of estate

Evans v Evans
(*Est of Evans*)
[28 Wis. 2d 97](#) (1965)

- 1) Conservatee may make gifts of conservatee's income and assets, subject to approval of Ct and conservator

Zobel v Fenendael
[127 Wis. 2d 382](#)
(Ct. App. 1985)

- 2) Conservatee CANNOT make gift without approval of Ct or conservator

- 3) Sale of real estate by conservator requires Ct order, as in guardianship

- 4) Inventory and annual accounting required

[§_711.08](#)

- 5) After an opportunity for a hearing under [§_54.76](#), gain access to protected person's digital property

[§_54.76\(3g\)](#)

B. Existing DPA for the individual remains in effect unless the Ct for good cause revokes or limits the authority of the agent

3. Termination of Conservatorship

[§_54.76\(7\)](#)

A. Conservator's powers cannot be terminated without a hearing and the occurrence of one of the following

- 1) Removal by Ct
- 2) Appointment of a guardian
- 3) Death of conservatee
- 4) Conservator or conservatee changes residence to another state

5) Ct finds cause for removal under §_54.76(6)

§_54.76(4)

B. Upon application of person under conservatorship, Ct must fix time and place for hearing

Notice given by mail to conservatee's guardian of the person, conservator, standby conservator, agent under PAHC, and presumptive adult heirs, at least 10 days before hearing

§_54.76(4)

C. Ct must find conservatee competent unless clearly shown to be incompetent and

- 1) Remove conservator, AND
- 2) Order income and assets restored to applicant

§_54.76(4)

D. If conservatee found incapable of handling income and assets, Ct must

- 1) Order conservatorship continued, OR
- 2) Appoint successor conservator
 - a. If applicant so desires
 - b. If nominee suitable

4. Conservator Fees

§_814.66(1)(b)

§_867.03(1g)

A. Fees due Register in Probate at time of filing inventory or valuation documents

- 1) If value of property less encumbrances, liens, or charges is \$50,000 or less, \$20
- 2) If value of property less encumbrances, liens, or charges is more than \$50,000, 0.2% of “value of the property, less encumbrances, liens or charges”

B. Fees due conservator

- 1) No statutory fees

Comment

- 2) Ct may have to review for fairness and reasonableness

GA 7: POWER OF ATTORNEY FOR HEALTH CARE

1. Definitions

§_155.01(3)

- A. Health care means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual’s physical or mental condition**

§_155.01(4)

- B. Health-care agent means individual designated by principal to make health-care decisions on behalf of principal or, if individual unwilling or unable to make those decisions, alternate individual designated by principal to do so**

§_155.05(3)

- 1) No health-care provider or employee of provider, no employee of health-care facility in which principal is patient or resident, or spouse of any of above may be health-care agent for principal UNLESS a relative of principal

§_155.05(5)

- 2) Principal may designate alternate health-care agent if first designee unable or unwilling to act

§_155.40(2)

- 3) If health-care agent is principal’s spouse or domestic partner and divorce or termination of domestic partnership after appointment as agent, Power of Attorney for Health Care (PAHC) revoked and instrument invalid

§_155.01(5)

C. Health-care decision means informed decision in exercise of right to accept, maintain, discontinue, or refuse health care

§_155.01(6)

D. Health-care facility means facility as defined in §_647.01(4) or any hospital, nursing home, community-based residential facility, Cty home, Cty infirmary, Cty hospital, Cty mental health center, or other place licensed or approved by DHS

§_155.01(8), §_155.05(2)

E. Incapacity means inability to receive and evaluate information effectively or to communicate decisions to extent that individual lacks capacity to manage health-care decisions; incapacity does NOT mean old age, eccentricity, or physical disability

§_155.01(10)

F. PAHC means designation by individual of another as individual's health-care agent for purpose of making health-care decisions on individual's behalf if individual cannot, because of incapacity

§_155.70(2)

- 1) No individual may be required to execute PAHC as condition for receipt of health care or admission to health-care facility
- 2) Designation of health-care agent under Power of Atty for Health Care Instrument (PAHCI) by principal may NOT be used as a bar to receipt of health care or admission to health-care facility

§_155.01(11)

G. Principal means individual who executes a PAHC

2. Appointment of Power of Attorney for Health Care

§_155.05(1)

A. Any competent person who has attained age 18 may appoint PAHC

Person under guardianship of the person in Wis is excluded

§_155.05(2)

B. PAHC takes effect

- 1) As specified in instrument, OR

- 2) Upon finding of incapacity by examiners. *See infra* [Sec. C.](#)

[§_155.05\(2\)](#)

C. Examiners

- 1) Must be 2 physicians or 1 physician and 1 licensed advanced practice clinician
- 2) Must personally examine principal and sign statement that principal has incapacity

Statement appended to PAHCI

- 3) May not be a relative
- 4) May not have knowledge of entitlement to or claim against principal's estate

3. Power of Attorney for Health Care Instrument

[§_155.10\(1\)](#)

A. Valid PAHCI must be all the following

- 1) In writing
- 2) Dated and signed by principal or by individual who has attained 18, at express direction and in presence of principal

[§_155.10\(3\)](#)

- a. "In the presence of" includes the simultaneous remote appearance by 2-way, real-time audiovisual communication technology if all of the statutory conditions are satisfied

- 3) Signed in presence of at least 2 witnesses each of whom

[§_155.10\(2\)](#)

- a. Has attained age 18

§_155.10(2)

- b. Is not related to the principal by blood, marriage, adoption, or the domestic partner under [Ch 770](#) of the principal
- c. Does not have knowledge that witness is entitled to or has claim on any portion of principal's estate
- d. Is not directly financially responsible for principal's health care
- e. Is not health-care provider who is serving principal at time of execution
- f. Is not principal's health-care agent

§_155.10(1)(d)

- 4) Voluntarily executed

§_155.70(6)

B. Photocopy or electronic facsimile copy presumed to be valid

C. Printed form PAHCI

§_155.30(3)

- 1) DHS prepares and distributes printed form PAHCI that must contain language specified in [§_155.30\(1\)](#)

Form available online at <https://www.dhs.wisconsin.gov/forms/advdirectives/index.htm>

§_155.30(1)

- 2) Other printed forms permissible

Must quote verbatim "Notice to Person Making This Document" in [§_155.30\(1\)](#)

- 3) If sold or distributed to person who does not have advice of Atty, cannot provide any authority other than authority to make health-care decisions

§_155.30(2)

D. PAHCI prepared by an Atty for a principal must contain either

- 1) “Notice to Person Making This Document” as specified in §_155.30(1), or
- 2) Certificate signed by Atty stating “I am a lawyer authorized to practice law in Wisconsin. I have advised my client concerning his or her rights in connection with this power of attorney for health care and the applicable law.”

4. Powers of Health-Care Agent

§_155.20(1)

A. Unless PAHCI otherwise provides, health-care agent known to health-care provider has priority over any individual other than principal to make health-care decisions

§_155.05(4)

- 1) Desires of principal who does not have incapacity supersede effect of PAHC

§_155.60(2)

- 2) PAHCI may be revoked by appointment of guardian in Wis. *See infra* [Sec. 5.C.](#)

§_155.20(2)(a)

B. Health-care agent MAY NOT consent to principal’s admission as inpatient to

- 1) Institution for mental diseases
- 2) Intermediate care facility for persons with an intellectual disability
- 3) State treatment facility
- 4) Treatment facility as defined in §_51.01(19)

§_155.20(2)(c)

C. Health-care agent MAY consent to admission of principal to

- 1) Nursing home for recuperative care for period not to exceed 3 months
 - a. If principal admitted directly from hospital inpatient unit
 - b. UNLESS hospital admission for psychiatric care
- 2) If principal lives with health-care agent, to a nursing home or community-based residential facility as temporary placement not to exceed 30 days

In order to provide health-care agent with vacation or to release health-care agent temporarily for family emergency

- 3) To nursing home or community-based residential facility for purposes other than those specified in [paras. 1\)](#) and [2\)](#) above IF
 - a. PAHCI specifically authorizes, AND
 - b. Principal not diagnosed as developmentally disabled or as having mental illness at time of proposed admission

[§_155.20\(2\)](#)

[§_55.055\(4\)](#)

- 4) Nursing home admissions by health-care agent are NOT protective placements

[§_155.20\(3\)](#)

D. Health-care agent MAY NOT consent, for principal, to

- 1) Experimental mental health research
- 2) Psychosurgery

- 3) Electroconvulsive treatment
- 4) Other drastic mental health treatment procedures

§_155.20(4)

- 5) Withholding or withdrawal of orally ingested nutrition or hydration

Unless provision of nutrition or hydration is medically contraindicated

§_155.20(4)

E. Health-care agent MAY consent, for principal, to

- 1) Withholding or withdrawal of non-orally ingested nutrition or hydration
 - a. If PAHCI authorizes
 - b. Unless principal's attending health care professional advises that withholding or withdrawal will cause principal pain or reduce principal's comfort

§_155.20(5)

F. Health-care agent must act in good faith

- 1) Consistently with desires of principal as expressed in PAHCI, OR
- 2) As otherwise specifically directed by principal to health-care agent AT ANY TIME
- 3) If no specific directive given and principal's desires unknown, then health-care agent must act in best interests of principal AND
- 4) Consistently with valid living will ([Ch. 154](#) declaration to physicians)

Comment

- 5) If conflict, PAHCI supersedes any directly conflicting provision of living will

[§_155.40\(1\)](#)

5. Revocation of Power of Attorney for Health Care

A. Principal may revoke PAHC at any time by doing ANY of following

- 1) Cancelling, defacing, obliterating, burning, tearing, or otherwise destroying PAHCI or directing another in presence of principal to destroy it
- 2) Executing a statement, in writing, signed and dated by principal, expressing intent to revoke PAHC
- 3) Verbally expressing intent to revoke PAHC in presence of 2 witnesses
- 4) Executing a subsequent PAHCI

[§_155.40\(2\)](#)

B. PAHC revoked and PAHCI is invalid if the agent at the time of execution is:

- 1) Spouse and there is a subsequent divorce or annulment, or
- 2) Domestic partner under [Ch 770](#) and there is a subsequent termination of the partnership

[§_155.60\(2\)](#)

C. If principal adjudicated incompetent in Wis and guardian is appointed, PAHC remains in effect

[§_54.46\(2\)\(b\)](#)

- 1) Except Ct, for good cause, may revoke PAHC and invalidate PAHCI or limit terms of PAHCI
- 2) UNLESS Ct revokes or limits under [para. 1](#)),

Guardian may NOT make health-care decisions that may be made by health-care agent, unless guardian is health-care agent

§_155.40(3)

D. If individual knows PAHC revoked

- 1) Must communicate fact to any health-care provider for principal who has copy of PAHCI

§_155.40(4)

Provider must note time, date, place of revocation, and of notification in principal's medical record

6. Safeguards and Penalties

§_155.60(1)

A. Nothing in [Ch 155](#) prohibits individual from petitioning a Ct in Wis for determination of incompetency and for appointment of guardian for principal

- 1) *See supra* [Sec. 5.C.](#)

§_54.15(3)

- 2) Ct must appoint health-care agent as guardian unless not in ward's best interests

§_155.60(3)

B. On receipt of PAHCI or statement of incapacity

Health-care facility or provider to acknowledge receipt in writing and include PAHCI or statement in medical record of principal

§_155.60(2)

C. If a guardian is appointed for a principal who has executed a PAHC, the PAHC remains in effect, under [§ 54.46](#), unless revoked or modified by the Ct. The guardian of the individual may not make health-care decisions for the principal that may be made by the agent

§_155.60(4)

D. Any interested party may petition Ct assigned to exercise probate jurisdiction for Cty where principal present or Cty of principal's legal residence to review whether health-care agent performing duties in accordance with terms of PAHCI

- 1) If Ct finds, after hearing, that health-care agent not performing in accordance with terms of instrument, Ct may
 - a. Direct health-care agent to act in accordance with terms of PAHCI
 - b. Require health-care agent to report to Ct concerning performance of agent's duties at periods of time established by Ct
 - c. Rescind all powers of health-care agent to act under PAHC and PAHCI
- 2) If principal designated alternate health-care agent and if powers of first-designated health-care agent rescinded, alternate health-care agent becomes health-care agent

E. Penalties

§ 155.80(1), (2)

- 1) Fine of not more than \$500 or imprisonment of not more than 30 days or both for person who
 - a. Directly or indirectly coerces, threatens, or intimidates individual to cause individual to execute PAHCI, or
 - b. Intentionally conceals, cancels, defaces, obliterates, damages, or destroys PAHCI without consent of principal

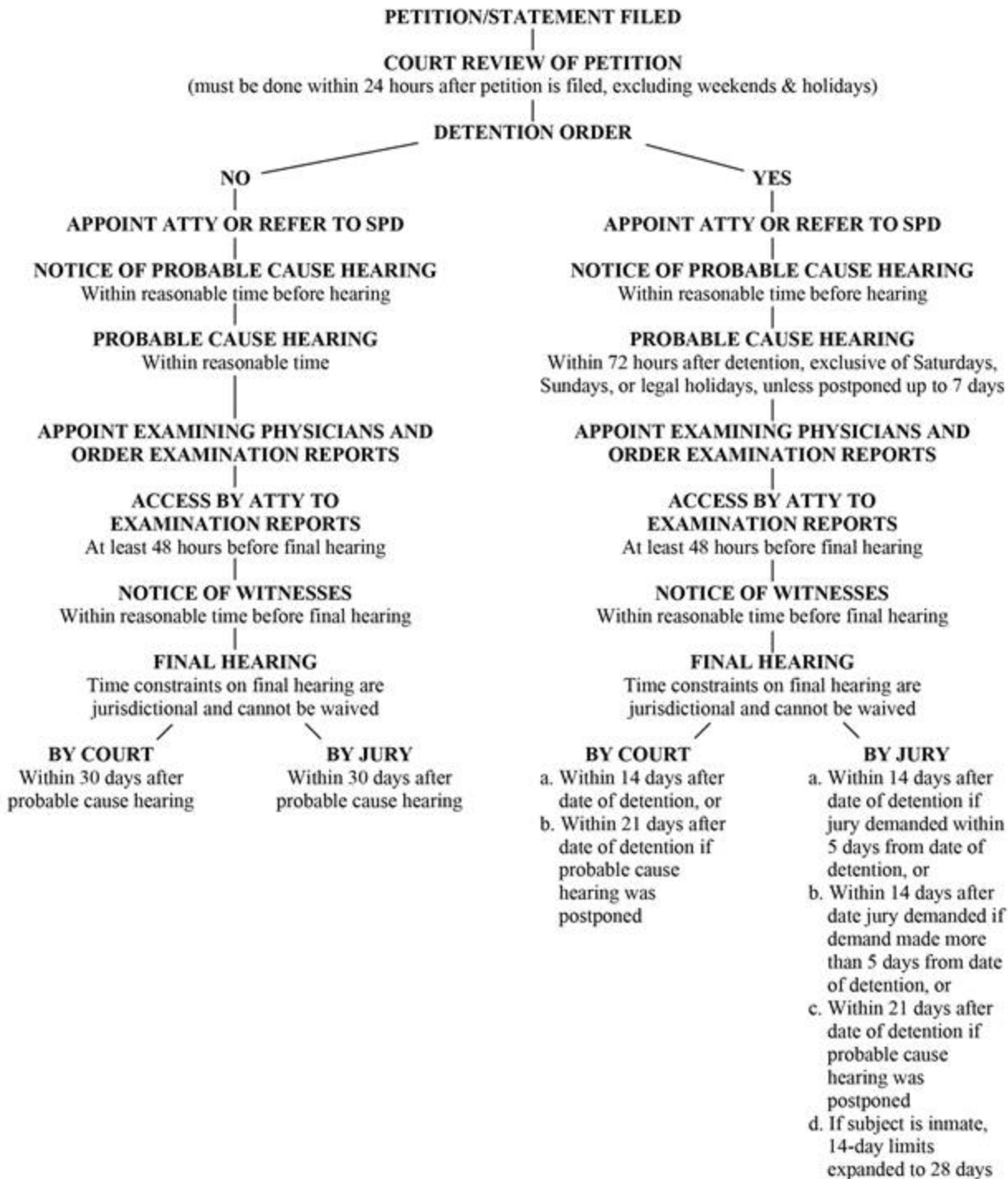
§ 155.80(3), (4), (5)

- 2) Fine of not more than \$1,000 or imprisonment of not more than 9 months or both for person who
 - a. Knowingly conceals, falsifies, or forges PAHCI with intent to create false impression that person other than health-care agent has been so designated, or
 - b. Intentionally withholds actual knowledge of revocation of PAHC or falsification or forgery of PAHCI, or

- c. Acts or attempts to act as health-care agent based on PAHCI individual knows has been
 - Executed without voluntary consent of principal
 - Forged or substantially altered without authorization of principal
 - Revoked

MH 1: INVOLUNTARY MENTAL COMMITMENTS

1. Flow Chart



2. Elements for Involuntary Commitment

§_51.20(1)(a)1.

A. Subject is mentally ill, developmentally disabled, or drug dependent

1) Mental illness

[§_51.01\(13\)\(b\)](#)

- a. Substantial disorder of thought, mood, perception, orientation, or memory, and
- b. Disorder grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet ordinary demands of life
- c. Does not include alcoholism

2) Developmental disability

[§_51.01\(5\)\(a\)](#)

- a. Disability attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi Syndrome, intellectual disability, or another neurological condition closely related to an intellectual disability or requiring similar treatment to that required for an intellectual disability, which has continued or can be expected to continue indefinitely and constitutes substantial handicap to the afflicted individual. For purpose of involuntary commitment, “developmental disability” does NOT include cerebral palsy or epilepsy

*Fond du Lac Cty v
Helen EF (In re
Commitment of
Helen EF)*
[2011 WI App 72](#)
[333 Wis. 2d 740](#),
aff'd, [2012 WI 50](#)
[340 Wis. 2d 500](#)

- b. Developmental disability does not include dementia that is primarily caused by degenerative brain disorder, as defined in [§_55.01\(1v\)](#)

*Fond du Lac Cty v
Helen EF (In re
Commitment of
Helen EF)*
[2011 WI App 72](#)
[333 Wis. 2d 740](#),
aff'd, [2012 WI 50](#)
[340 Wis. 2d 500](#)

- c. Involuntary administration of psychotropic medication for behavioral disturbances resulting from dementia, such as impulsivity, agitation, and physical aggression, can only be ordered under [§_55.14](#) and not [Ch 51](#)

Waukesha Cty v JWJ
[2017 WI 57](#)
[375 Wis. 2d 542](#)

B. Proper subject for treatment

*Milw Cty Combined
Cmty Servs Bd v Athans
(In re Athans)*
[107 Wis. 2d 331](#)
(Ct. App. 1982)

- 1) Must be capable of rehabilitation, not merely habilitation

*CJ v St (In re Mental
Condition of CJ)*
[120 Wis. 2d 355](#)
(Ct. App. 1984)

- a. Rehabilitation is active treatment to ameliorate impairments and facilitate subject's capacity to function; does not require a "cure"—includes control of symptoms, management of illness
- b. Habilitation provides for personal maintenance and functioning—daily living skills

*Fond du Lac Cty v
Helen EF (In re
Commitment of
Helen EF)*
[2011 WI App 72](#)
[333 Wis. 2d 740](#),
aff'd, [2012 WI 50](#)
[340 Wis. 2d 500](#)

- If person needs habilitation, look to [Ch 54](#) and [Ch 55](#)

C. Subject is dangerous because subject

[§ 51.20\(1\)\(a\)2.a.](#)

- 1) Evidences substantial probability of physical harm to self, manifested by

- a. Recent threats of or attempts at suicide, or

*Outagamie Cty v
Michael H (Commitment
of Michael H)*
[2014 WI 127](#), ¶ 6
[359 Wis. 2d 272](#)

Note: An articulated plan is NOT a necessary component of a suicide threat.

- b. Recent threats of or attempts at serious bodily harm

§_51.20(1)(am)

Note: If the subject is in treatment, the requirement of recent threats or attempts may not apply. *See* [Sec. 2.C.8](#)), *infra*

§_51.20(1)(a)2.b.

2) Or evidences substantial probability of physical harm to others, manifested by

a. Recent homicidal or violent behavior, or

b. Others being placed in reasonable fear of violent behavior and serious physical harm, as evidenced by a recent overt act, attempt, or threat to do such harm to others

RJ v Winnebago Cty

(*In re RJ*)

[146 Wis. 2d 516](#)

(Ct. App. 1988)

- Focus on mental state and objective acts of subject
- Determination of class of persons placed in reasonable fear, i.e., “others” is objective, not subjective test

§_51.20(1)(am)

c. If the subject is in treatment, the requirement of recent acts, attempts, or threats may not apply. *See* [Sec. 2.C.8](#)), *infra*

§_51.20(1)(a)2.b.

d. Finding by Juv Ct that Juv committed act(s) alleged in §_938.12 or §_938.13(12) petition may be used to prove [para. a.](#) or [para. b.](#) above

§_51.20(1)(a)2.c.

§_51.15(1)(ar)3.

3) Or evidences judgment so impaired that substantial probability exists of physical impairment or injury to self or others, as manifested by pattern of recent acts or omissions

§_51.20(1)(am)

a. If subject is in treatment, requirement of pattern of recent acts or omissions may not apply. *See* [Sec. 2.C.8](#)), *infra*

b. EXCEPT, if reasonable provision for subject’s protection available in community and reasonable probability subject will avail self of services

[§_51.20\(1\)\(ab\)](#)

- Subject's detention in prison, jail, or criminal detention facility does NOT constitute protection available in community

[§_51.20\(1\)\(a\)2.c.](#)

- EXCEPT, if subject appropriate for protective placement or protective services under [Ch 55](#), CHIPS disposition under [§_48.13\(4\)](#) or (11), or JIPS disposition under [§_938.13\(4\)](#)
- Substantial probability not automatically established by subject's status as minor

[§_51.20\(1\)\(a\)2.d.](#)

- Or is unable to satisfy basic needs because of mental illness, establishing substantial probability that death or serious physical injury, debilitation, or disease will imminently ensue unless prompt and adequate treatment provided, as evidenced by recent acts or omissions
- EXCEPT, if reasonable provision for treatment and protection available in community and reasonable probability subject will avail self of services

[§_51.20\(1\)\(ab\)](#)

- Subject's detention in prison, jail, or criminal detention facility does not constitute protection available in community

[§_51.20\(1\)\(a\)2.d.](#)

- EXCEPT, if subject appropriate for protective placement or protective services under [Ch 55](#), [§_48.13\(4\)](#) or (11), or [§_938.13\(4\)](#)
- Substantial probability not automatically established by subject's status as minor

[§_51.20\(1\)\(am\)](#)

- If subject has been in community treatment, requirement of recent acts or omissions may not apply. See [Sec. 2.C.8](#), *infra*

[§_51.20\(1\)\(a\)2.e.](#)

- Or, under 5th standard (in [§_51.20\(1\)\(a\)2.e.](#)), is mentally ill and

St v Dennis H
(Commitment of
Dennis H)
[2002 WI 104](#)
[255 Wis. 2d 359](#)

Note: 5th standard is constitutional.

a. Based on both history and recent acts or omissions

§_51.20(1)(am)

- If subject has been in treatment, requirement of pattern of recent acts or omissions may not apply. See [Sec. 2.C.8](#)), *infra*

b. There is substantial probability that person needs care or treatment to prevent further disability or deterioration; **and**

c. There is substantial probability that person, if untreated will

- Lack services necessary for health or safety, **and**
- Suffer severe mental, emotional, or physical harm that will result in **either**

— Loss of ability to function independently in community **or**

— Loss of cognitive or volitional control over thoughts or actions

*Dane Cty v Kelly M (In re
Commitment of Kelly M)*

[2011 WI App 69](#)
[333 Wis. 2d 719](#)

d. Probability of suffering severe mental, emotional, or physical harm is **not** substantial if reasonable provision for individual's care or treatment is available in community and reasonable probability that individual will use available services

- “Services” under §_51.20(1)(a)2.e. includes medication

*Dane Cty v Kelly M (In
Commitment of Kelly M)*

[2011 WI App 69](#)
[333 Wis. 2d 719](#)

e. Individual with dual diagnoses of mental illness and either drug dependency or developmental disability may be eligible for 5th standard commitment if sufficient services cannot be provided under [Ch 55](#) order of placement or services. Individual under [Ch 55](#) order, or individual not yet under [Ch 55](#) order but eligible for one, must be treated under [Ch 55](#) (not [Ch 51](#)) if treatment under [Ch 55](#) (specifically [§_55.14](#)) would be effective in reducing probability of suffering severe mental, emotional, or physical harm to less than “substantial probability”

§_51.20(13)(g)2d.

- f. After 30th day after commitment, may be treated as outpatient only. But if individual violates conditions, may be transferred to inpatient facility for up to 30 additional days

§_51.20(7)(d)2., (13)(dm)

- g. Probable cause or final finding on 5th standard constitutes a finding that individual not competent to refuse medication

Marathon Cty v DK
(*In re Condition of DK*)
[2020 WI 8](#)
[390 Wis. 2d 50](#)

- 6) See *Marathon Cty v DK* for discussion of sufficiency of the evidence on dangerousness under §_51.20(1)(a)2.b.

Langlade Cty v DJW
(*In re Mental*
Commitment of DJW)
[2020 WI 41](#)
[391 Wis. 2d 231](#)

- 7) Circuit courts must make a specific factual finding as to which dangerousness standard has been met under §_51.20(1)(a)2.

Sheboygan Cty v MW
(*In re Mental*
Commitment of MW)
[2022 WI 40](#)
[402 Wis. 2d 1](#)

The remedy when the Circuit Ct commits a *DJW* violation (does not meet the requirements of §_51.20(1)(a)2.) is outright reversal. The recommitment order expired and the Circuit Ct lacks competency to conduct any proceedings on remand

§_51.20(1)(am)

- 8) Exceptions to required showing of recent acts, attempts, omissions, threats, or behavior
 - a. Subject in inpatient treatment or committed to outpatient treatment immediately before commencement of proceedings, and treatment record shows substantial likelihood that subject would be proper subject for commitment if treatment withdrawn
 - b. If subject voluntarily admitted to inpatient facility less than 30 days before commencement of proceedings, and there voluntarily at time proceedings commenced, Ct may examine acts, omissions, threats, attempts, or behavior immediately before admission

§_51.20(1)(ar)

D. See [MH 3](#) for requirements for petitions for State prison inmates

3. Commencement of Action

A. Three ways of commencing action

1) Emergency detention

[§_51.15\(2\), \(4\)\(a\), \(5\)](#)

Milwaukee Cty v Parham

(In re Parham)

[95 Wis. 2d 21](#)

(Ct. App. 1979)

- a. In counties with population of less than 750,000, law enforcement officer files statement of emergency detention with Ct, which commences action and has same effect as [§_51.20](#) petition. The officer who does the detention does not have to be the same officer who signs the statement. Detention at a facility must be approved by Cty Dept of community programs in Cty where individual was taken into custody

[§_51.15\(2\)\(d\)](#)

Note: Detention facilities permitted for emergency detentions now include crisis urgent care and observation facilities as defined in [§_51.036](#).

[§_51.15\(4\)](#)

Milwaukee Cty v Parham

(In re Parham)

[95 Wis. 2d 21](#)

(Ct. App. 1979)

- b. In counties with population of 750,000 or more (Milwaukee Cty), law enforcement officer delivers statement to detention facility, which files statement and any supplemental information with Ct. The officer who does the detention does not have to be the same officer who signs the statement

[§_51.15\(10\)](#)

2) Petition of treatment director or designee

- a. Treatment director or designee of facility where individual voluntarily admitted may sign and file statement of emergency detention, which commences action and has same effect as [§_51.20](#) petition

Dane Cty v Stevenson LJ

[2009 WI App 84](#)

[320 Wis. 2d 194](#)

- b. [Sec. 51.15\(10\)](#) does not authorize continued detention of involuntary individual who has not been given probable cause hearing within statutorily required time

[§_51.20\(1\)\(b\), \(c\)](#)

3) Three-person petition ([§_51.20](#) petition)

- a. Must be signed by 3 adults, at least 1 of whom has personal knowledge of subject's conduct
- b. See [Sec. C.](#) below for contents of petition

B. Venue

§_51.20(1)(c)

- 1) Cty of subject's legal residence or where subject present

§_801.50(1)

- 2) Not a jurisdictional issue

C. Contents of petition or statement

§_51.20(4)

DS v Racine Cty

(In re DS)

[142 Wis. 2d 129](#) (1987)

- 1) Only Corp Counsel can represent interest of public and draft necessary papers

Except if multi-cty Dept for community services or developmental disability contracts for legal services

§_51.20(1)(c)

- 2) Petition

- a. Must allege all elements for involuntary commitment

- b. Must include statement of facts constituting probable cause to believe allegation

§_51.20(1)(b)

- c. Must be sworn to be true, signed by 3 adults, at least 1 of whom has personal knowledge of subject's conduct

§_51.20(1)(c)

- If petitioner does not have personal knowledge of conduct, petition must contain statement providing basis for petitioner's belief

§_51.20(1)(b)

- Does not apply to petitions filed pursuant to Ct order under [§_938.30\(5\)\(c\)1.](#) or (d)1. when Juv Ct finds child not responsible for criminal act by reason of mental disease or defect, probable cause to believe Juv (1) mentally ill, drug dependent, or developmentally disabled and (2) dangerous

§_51.20(1)(c)

- d. Must contain names and addresses of petitioners, their relation to subject; names and addresses of subject's spouse, adult children, parents or guardian, custodian, siblings, person in place of a parent, and person with whom subject resides, if known

- If information unknown to petitioners or inapplicable, petition must so state

§_51.15(4), (5)

3) Statement of emergency detention

§_51.15(1)(ar), (b)

- a. Must provide detailed, specific information concerning recent overt act, attempt or threat to act, or omission that formed basis for detention, and names of persons observing or reporting the act, attempt, threat, or omission
- b. Need not designate whether subject mentally ill, developmentally disabled, or drug dependent, but must allege that officer/treatment director has cause to believe subject evidences one or more of these conditions
- c. Must provide finding that taking person into custody is the least restrictive alternative appropriate to the person's needs

Comment

- d. Note distinction between singular "act" of §_51.15 and plural "acts" of §_51.20

§_51.20(2)

D. Ct or Ct Comm'r must review petition or statement and issue detention order IF subject meets standard for commitment

- 1) Based on specific facts set forth in petition
- 2) Facts based on specific recent overt acts, attempts, or threats, or pattern of recent acts or omissions
- 3) Cause to believe subject is mentally ill, drug dependent, or developmentally disabled

Comment

- 4) Note distinction between singular "act" of §_51.15 and plural "acts" of §_51.20

E. Legal counsel for subject

§_51.20(3)

[RMC Form GF-131A](#)

[RMC Form GF-131B](#)

- 1) Upon filing of petition, Ct must ensure subject represented by adversary counsel, even if not indigent

Ct must refer to SPD for appointment of counsel under [§_51.60](#)

SY v Eau Claire Cty

(In re Condition of SY)

[162 Wis. 2d 320](#), 331–32

(1991)

Pickens v St

[96 Wis. 2d 549](#) (1980)

overruled on other

grounds by St v Klessig

[211 Wis. 2d 194](#) (1997)

- 2) “Adversary counsel” may include person representing self

“[A] party, after having received the imprimatur of the court ..., proceeding in proper person is an adversary counsel engaged in self-representation.”

§_51.20(2)

F. Notice

- 1) Must be given subject, Atty, parent or guardian if known and subject is minor, and others designated by Ct
- 2) Law enforcement officer must give subject notice of hearing, copy of petition and detention order (if subject detained), and written statement of
 - a. Right to Atty
 - b. Right to jury trial if requested more than 48 hours before final hearing
 - c. Commitment standard

- d. Right to probable cause hearing within 72 hours after the individual is taken into custody under [§_51.15](#) (excluding weekends and holidays)

3) Personal service of notice of time and place of probable cause hearing to subject and Atty

Notice to others may be by telephone with written statement filed by person giving notice showing time and person to whom spoke

4) Notice served within reasonable time before hearing

[§_51.20\(1\)\(ad\)1.](#)

- 5) When petition based on 5th standard, petition must be reviewed and approved by AG before it is filed. If AG does not approve petition, or fails to act with respect to petition, petition may not be filed

[§_51.20\(1\)\(ad\)2.](#)

Provision regarding AG approval will not apply if AG finds that a Ct of competent jurisdiction in Wis has upheld constitutionality of 5th standard

St v Dennis H
(In re Commitment of
Dennis H)
[2002 WI 104](#)
[255 Wis. 2d 359](#)

Note: The Wisconsin Supreme Court has held that the 5th standard in [§_51.20\(1\)\(a\)2.e.](#) is constitutional.

4. Probable Cause Hearing Procedure

[§_51.20\(7\)\(am\)](#)

A. Before hearing

[§_51.20\(7\)\(am\)](#)

- 1) Subject may not be examined, evaluated, or treated for nervous or medical disorder pursuant to Ct order unless Ct first
 - a. Attempts to determine whether person enrolled in HMO, limited service health organization, or preferred provider plan, and, if so,
 - b. Notifies organization or plan that subject in need of examination, evaluation, or treatment for nervous or mental disorder

B. Time requirements

§_51.20(7)(a)

§_51.15(4), (5)

1) If subject detained

§_51.15(3), (4)(b), (5)

- a. Hearing scheduled and held within 72 hours after subject taken into physical custody for the purposes of emergency detention

§_51.15(3)

- Custody begins when subject is under the physical control of the law enforcement officer or other person authorized to make an emergency detention, except that if a law enforcement agency contracts with another law enforcement agency to transport an individual for the purposes of emergency detention, custody is transferred to the transporting law enforcement agency
- Excludes weekends and legal holidays

Dodge Cty v Ryan EM (In re Mental Commitment of Ryan EM)

[2002 WI App 71](#)

[252 Wis. 2d 490](#)

- Hours in 1st day of detention are included in time calculation

§_51.20(7)(a)

- b. Hearing may be postponed

- Upon request by subject or Atty
- Postponement cannot exceed 7 days from date of detention

§_51.20(7)(b)

- 2) If subject not detained or is prison inmate, hearing held within reasonable time

§_51.10(6)

- 3) If subject becomes voluntary patient, hearing may be postponed for up to 30 days, after which Ct must dismiss proceedings

See [MH 4](#) for procedure for involuntary to voluntary

[§_51.20\(8\)\(bg\)](#)

C. Time periods may be waived

- 1) By subject or subject's legal counsel with subject's consent
- 2) For period not to exceed 90 days from date of waiver
- 3) IF subject and Corp Counsel (or multi-cty Dept designee) agree any time after commencement of proceedings that subject to obtain treatment under a settlement agreement
- 4) See [MH 4](#) for discussion of settlement agreements

D. Hearing requirements

[§_51.20\(5\)](#)

- 1) Must conform to essentials of due process and fair treatment, including

[§_51.20\(12\)](#)

- a. Right to open hearing and right to request closed hearing
 - Request for closed hearing made on motion of subject or Atty with subject's approval
- St ex rel Wis St J v Cir Ct*
[131 Wis. 2d 515](#)
 (Ct. App. 1986)
- Ct must hold hearing on question of closure
 - Ct must publicly reach decision on closure based on exercise of discretion

- b. Right to counsel

c. Right to present and cross-examine witnesses

d. Right to remain silent

§_801.58

e. Right of substitution

§_51.20(6)

2) For Juvs, hearings held before Juv Ct

§_51.20(5)

a. Parents have right to participate and be represented by counsel

§_51.20(12)

b. Hearing closed unless open hearing demanded by Juv through Atty

§_51.20(10)(c)

3) Rules of evidence and civil procedure apply

§_905.04(4)(a), (b)

§_51.20(9)(a)4.

a. Medical records and psychological reports relevant to an issue in probable cause or final proceedings to commit a patient under §_51.20 are not privileged

§_51.20(9)(a)4.

b. Statement by appointed physician or psychologist not privileged provided that examiner advised the proposed subject individual that individual's statements may be used as basis for order for commitment or for order for psychotropic medication, and that individual has right to remain silent (this does not affect hearsay issue if that issue is raised at hearing)

§_807.13

4) Experts may testify and be examined by telephone

§_753.24(2m)

Ct may be held with the Judge and any participants appearing from a remote location using telephone or videoconferencing technology subject to §§_885.50–885.64 and constitutional requirements

§_51.20(5)

5) Hearing may be held at institution where subject detained unless subject or Atty objects

Recommendation

- a. If it appears unsafe to move person from institution, hold hearing on safety issue, and hold hearing at institution if necessary to protect safety and well-being of subject or the public
- b. Where Ct and facility are 100 or more miles apart, videoconferencing in lieu of personal appearance in Ct is permitted

§ 51.20(7)(c)

- 6) If undetained subject fails to appear for hearing

- a. Ct may issue order for detention
- b. Ct must hold probable cause hearing within 48 hours after detention, excluding weekends and legal holidays

§ 51.20(10)(c)

- 7) Ct must disregard errors or defects in proceedings that do not affect substantial rights of either party

§ 51.20(1m)

E. Finding of probable cause satisfied by

- 1) Finding probable cause to believe subject mentally ill, drug dependent, or developmentally disabled and proper subject for treatment
- 2) AND evidences such impaired judgment, manifested by evidence of a recent act or omission, that substantial probability of physical impairment or injury to self
 - a. Probability NOT substantial if reasonable provision for subject's protection available in community and reasonable probability subject will avail self of services
 - b. OR, if subject appropriate for protective placement or protective services under [Ch 55](#)

5. Probable Cause Hearing Dispositions

§ 51.20(7)(e)

A. If no probable cause, proceeding dismissed

§_51.20(8)(bg)

B. Time periods may be waived

- 1) By subject or legal counsel with subject's consent
- 2) For period not to exceed 90 days from date of waiver
- 3) IF subject and Corp Counsel (or multi-cty Dept designee) agree any time after commencement of proceedings that subject to obtain treatment under settlement agreement

See [MH 4, Sec. 2](#), for full discussion of settlement agreements

[RMC Form ME-910](#)

C. If probable cause to believe allegations

§_51.20(7)(c)

- 1) Ct must schedule final hearing
 - a. Unless waived by subject or subject's Atty with subject's consent under settlement agreement, OR
 - b. Unless jury trial demanded more than 5 days after detention
 - c. If waived, conditional order may be entered

§_51.20(9)(a)

- 2) Ct must appoint examining physicians

See [Sec. 7, Examinations](#), below

§_51.20(8)(b)

3) Ct may order detention

- a. Upon finding that services provided to released subject not available, suitable, or desirable
 - Finding based on condition of subject

§_51.20(8)(a)

4) Ct may release subject pending full hearing

- a. May state conditions for release and stipulate actions to be taken if breached

Recommendation

- b. One condition should require appearance at examination
- c. Subject may reject conditions and “choose” detention

§_51.61(1)(g)2.

- d. Right to receive treatment voluntarily or accept treatment as condition for release does NOT apply to subject for whom probable cause found that subject not competent to refuse medication or treatment (See [MH 5, Sec. 2](#))

§_51.20(7)(am)

5) Subject may not be examined, treated, or evaluated unless Ct first

- a. Determines whether subject enrolled in HMO, limited health service organization, or preferred provider plan, and
- b. Notifies organization or plan that subject in need of treatment, evaluation, or examination for nervous or mental disorder

§_51.20(7)(d)

D. Conversion to [Ch 55](#)—If Ct finds probable cause to believe subject fit for guardianship and protective placement or services

- 1) Ct may appoint temporary guardian without further notice not to exceed 30 days

Comment

[Ch 54](#) guardianship provisions do not apply

- 2) Ct may order temporary protective placement or services under [Ch 55](#) for up to 30 days

Note

Generally does not apply to minors except in very special circumstances

- 3) Ct may order involuntary administration of psychotropic medications if there is probable cause to believe that the allegations under [§ 55.14\(3\)\(e\)](#) apply

See [MH 5, Sec. 2.G.](#), this volume

[§ 51.20\(7\)\(dm\)](#)

E. If probable cause to believe subject fit for alcohol treatment under [§ 51.45\(13\)](#)

- 1) Proceed as if petition filed under [§ 51.45\(13\)](#)
- 2) But only if petitioner's counsel notifies parties and Ct within reasonable time before hearing of intent to request Ct to pursue alcohol commitment
- 3) See [MH 2](#) for discussion of alcohol commitment

Dane Cty v CMB
(*In re Mental*
Condition of CMB)
[165 Wis. 2d 703](#) (1992)

F. Review of Ct Comm'r probable cause finding is de novo before Circuit Ct

Milw Cty v Louise M
(*Commitment of*
Louise M)
[205 Wis. 2d 162](#) (1996)

Review of probable cause finding is discretionary under standards listed in case

6. Precommitment Medication

[§_51.20\(8\)\(c\)](#), [§_51.15\(8\)](#)

A. Medication may be administered during detention and before commitment

- 1) When subject gives informed, written consent, or
- 2) In emergencies, when medication necessary to prevent serious physical harm to subject or others, or
- 3) Under Ct order

[§_51.61\(1\)\(h\)](#)

- 4) In all cases, must be given only on physician's written order

[RMC Form ME-905](#)

B. Ct may order medication when probable cause to believe subject

- 1) Not competent to refuse medication if, after advantages and disadvantages of and alternatives to medications or treatment have been explained, either

[§_51.61\(1\)\(g\)4.](#)

- a. Is incapable of expressing understanding of such explanation, or
- b. Is incapable of applying such understanding to make an informed choice whether to accept or refuse

Winnebago Cty v CS

[2020 WI 33](#)

[391 Wis. 2d 35](#)

Note: [Sec. 51.61\(1\)\(g\)3.](#) is facially unconstitutional for any inmate who is involuntarily committed under [§_51.20\(1\)\(ar\)](#), which does not require a determination of dangerousness, when the inmate is involuntarily medicated based merely on a determination that the inmate is incompetent to refuse medication.

Winnebago Cty v

Christopher S

[2016 WI 1](#)

[366 Wis. 2d 1](#)

Outagamie Cty v

Melanie L

[2013 WI 67](#)

[349 Wis. 2d 148](#)

But see Marathon Cty

v DK

(In re Condition of DK)

[2020 WI 8](#)

[390 Wis. 2d 50](#)

c. Medical testimony must track statutory factors

Virgil D v Rock Cty

(In re Mental

Condition of Virgil D)

[189 Wis. 2d 1](#), 15–16

(1994)

d. Factors Ct should consider in determining whether individual understands advantages and disadvantages of and alternatives to proposed medication or treatment:

- Whether the individual is able to identify the type of recommended medication or treatment;
- Whether the individual has previously received the type of medication or treatment at issue;
- If the individual has received similar treatment in the past, whether the individual can describe what happened as a result and how the effects were beneficial or harmful;
- If the individual has not had similar treatment in the past, whether the individual can identify the risks and benefits associated with the recommended treatment or medication; and
- Whether the individual holds any patently false beliefs about the recommended treatment, which would prevent an understanding of legitimate risks and benefits

§ 51.61(1)(g)2.

2) And, medication will have therapeutic value

3) And, medication will not unreasonably impair ability of subject to prepare for and participate in legal proceedings

4) Order may be entered

a. At or after probable cause hearing

§ 51.20(5)

- b. Hearing must conform to essentials of due process and fair treatment

7. Examinations and Discovery

A. Examiners appointed if probable cause found

[§ 51.20\(9\)\(a\)](#)

B. Requirements for examiners

- 1) Two licensed physicians specializing in psychiatry, or
- 2) One licensed physician and one licensed psychologist, or
- 3) Two licensed physicians one of whom must have specialized training in psychiatry, or
- 4) If psychologist or psychiatrist unavailable, 2 physicians

St v Elson

[60 Wis. 2d 54](#), 68 (1973)

- 5) Must have specialized knowledge determined by Ct to be appropriate to need of subject

[§ 51.20\(9\)\(a\)](#)

- 6) Examiner may not be related to subject by blood, adoption, or marriage
- 7) Examiner may not hold an interest in subject's property

C. Subject may nominate 1 of the 2 examiners and Ct may appoint nominated examiner, provided

- 1) Subject makes selection known to Ct within 24 hours after completion of probable cause hearing
- 2) Nominated examiner meets required qualifications

3) Nominated examiner available

§_51.20(9)(a)3.

D. Independent examinations

1) Independent examinations allowed if requested by

- a. Subject or subject's Atty
- b. Any other interested party and Ct permits

2) Independent examinations performed at subject's own expense, unless

- a. Subject indigent, and
- b. Ct approves examination to be made at reasonable expense to Cty of subject's legal residence

E. Examinations

§_51.20(7)(am)

- 1) Subject may not be examined, evaluated, or treated for nervous or medical disorder pursuant to Ct order unless Ct first
 - a. Attempts to determine whether person enrolled in HMO, limited service health organization, or preferred provider plan and, if so,
 - b. Notifies organization or plan that subject in need of examination, evaluation, or treatment for nervous or mental disorder

§_51.20(9)(a)5.

2) Ct must designate time and place for examination, and order subject to appear, if not detained

§_51.20(9)(a)5.

- 3) Examiners must personally observe and examine subject

Subject's treatment records must be made available to examiners

§_51.20(9)(a)4.

- 4) Before examination, subject must be informed that statements can be used as basis for commitment and that subject has right to remain silent

F. Examiners' reports

§_51.20(9)(a)5.

- 1) Must be in writing
- 2) Must be independent of each other
- 3) To include
 - a. Whether subject proper subject for treatment
 - b. Whether subject dangerous
 - c. Appropriateness of various treatment modalities or facilities

§_51.20(9)(b)

- 4) If examiners determine person fit subject for treatment, report must include
 - a. Recommendation on proper level of treatment
 - Ct may order additional information about level of treatment from Cty Dept or from staff of public treatment facility where subject detained pending final hearing

- b. Level of inpatient facility providing least restrictive environment consistent with needs of subject, if any
- c. Facility where subject should be received into mental health system

§_51.20(9)(a)

- 5) Each element of report must be based on beliefs to a reasonable degree of medical or professional certainty

If examiners unable to make conclusions to such degree, report must so state

§_51.20(10)(b)

- 6) Subject's Atty must have access to reports at least 48 hours before final hearing

RS v Milw Cty
(In re Gdnship of RS)
[162 Wis. 2d 197](#) (1991);
cf. 54.36(1)

- 7) If objected to, report inadmissible hearsay unless examiner testifies and is available for cross- examination

WJC v Cty of Vilas
(In re WJC)
[124 Wis. 2d 238](#)
 (Ct. App. 1985);
see also §_807.13

Experts may testify and be cross-examined by telephone

§_753.24(2m)

Ct may be held with the Judge and any participants appearing from a remote location using telephone or videoconferencing technology subject to §§_885.50–885.64 and constitutional requirements

§_51.20(9)(a)5.
Outagamie Cty v LXD-O
(In re Mental
Commitment of LXD-O)
[2023 WI App 17](#), ¶ 3
[407 Wis. 2d 441](#)
pet to rev denied

- 8) An examiner's report need not be admitted into evidence for a Circuit Ct to consider the report during initial commitment proceedings

§_51.20(9)(a)5.
Outagamie Cty v LXD-O
(In re Mental
Commitment of LXD-O)
[2023 WI App 17](#), ¶ 35
[407 Wis. 2d 441](#)
pet to rev denied

Sec. 51.20(9) does not apply to recommitment hearings

G. Discovery

§_51.20(10)(b)

City of Dodge v Michael

JK (In re Michael JK)

[209 Wis. 2d 499](#)

(Ct. App. 1997)

- 1) Subject's Atty must have access to all psychiatric and other reports at least 48 hours before final hearing

§_51.20(10)(a)

- 2) Each party must notify all other parties of all witnesses that party intends to call at hearing and of substance of proposed testimony

- a. Notice within reasonable time before final hearing

- b. But, witnesses not included in notice not barred from testifying at hearing unless prejudicial to opposing party

§_51.20(9)(c)

- 3) Ct may delay hearing for period necessary to complete discovery if motion made by subject

§_51.20(9)(c)

- 4) [Sec. 51.20\(9\)\(c\)](#) governs discovery of physical evidence

8. Final Hearing Procedure

§_51.20(8)(bg)

A. Time periods may be waived

- 1) By subject or legal counsel with subject's consent
- 2) For period not to exceed 90 days after waiver
- 3) IF subject and Corp Counsel (or multi-cty Dept designee) agree any time after commencement of proceedings that subject to obtain treatment under settlement agreement

See [MH 4](#) for discussion of settlement agreements

§_51.20(7)(c)
St ex rel Lockman
v Gerhardstein
[107 Wis. 2d 325](#)
 (Ct. App. 1982)

B. Time constraints if subject detained

1) Final hearing held within 14 calendar days after date of detention, provided

a. No jury demanded, or

§_51.20(11)(a).

b. Jury demanded within 5 days from date of detention

- If subject is prison, jail, or house of corrections inmate, final hearing held within 28 days after probable cause hearing if jury demanded within 5 days after probable cause hearing

§_51.20(11)(a)

2) Or, final hearing held within 14 days after date jury demanded if demand made more than 5 days from date of detention

If subject is prison, jail, or house of corrections inmate, final hearing held within 28 days after jury demand if demand made more than 5 days after probable cause hearing

§_51.20(7)(c)

3) Or, final hearing held within 21 days after date of detention, if probable cause hearing postponed under [§_51.20\(7\)\(a\)](#)

4) Or, if subject is prison, jail, or house of corrections inmate, final hearing held within 30 days after date of probable cause hearing if no jury demanded

C. Time constraints if subject NOT detained

§_51.20(7)(c)

Final hearing held within 30 days after probable cause hearing

St ex rel Lockman
v Gerhardstein
[107 Wis. 2d 325](#)
 (Ct. App. 1982)

D. Time constraints on final hearing

St ex rel Sandra D
v Getto
(Gdnship of Sandra D)
[175 Wis. 2d 490](#)
 (Ct. App. 1993)

- 1) Trial Ct lacks competence to proceed after expiration of time limit
- 2) Time constraints cannot be waived

Except as specifically provided in [Sec. A.](#) above

Cty of Milw v Edward S
(In re Mental
Commitment of
Edward S)
[2001 WI App 169](#)
[247 Wis. 2d 87](#)

- 3) Reasonable extension of 14-day deadline may be allowed when extension caused solely by conduct and manipulation of detained subject

§_51.20(10)(a)

E. Notice

- 1) Petitioner's Atty must notify subject and subject's counsel of time and place of final hearing

Ct may designate additional persons to receive notice of time and place of hearing

- 2) Within reasonable time, each party must notify others of witnesses to be called and substance of testimony

Lack of notice not a bar to witnesses' testimony unless prejudicial to opposing party

§_51.20(11)

F. Jury

1) Demand for jury trial must be made at least 48 hours before hearing, or deemed waived

- a. Applies if subject or Atty notified of time set for trial

Waukesha Cty v EJW

[2021 WI 85](#)

[399 Wis. 2d 471](#)

- b. The subject is not limited to filing a jury demand only the first time a final hearing is set. This (the statutory time limit) also applies when a final hearing is rescheduled

Walworth Cty v MRM

(In re Mental

Commitment of MRM)

[2023 WI 59](#)

[408 Wis. 2d 316](#)

Note: The holding in *Waukesha Cty v EJW*, [2021 WI 85](#), [399 Wis. 2d 471](#), applies retroactively.

- c. Demand made by subject, or by subject's Atty and subject does not object

SB v Racine Cty

(In re SB)

[138 Wis. 2d 409](#) (1987)

- d. Withdrawal of jury demand is personal right of subject

Winnebago Cty v JM

[2018 WI 37](#)

[381 Wis. 2d 28](#)

(prison garb)

- e. All rights of individuals in criminal cases extend to civil commitments

2) Ct must direct drawing of 6-person jury

[Wis JI-Cv 7050](#)

- a. Issue: Whether commitment standard is met

[§.51.20\(11\)\(b\)](#)

- b. All questions on verdict must be agreed to by at least same 5 jurors

Milwaukee Cty v

Mary F-R

[2013 WI 92](#)

[351 Wis. 2d 273](#)

- c. 6-person juries are constitutional as well as 5/6 verdicts

G. Procedure

*Shirley JC v Walworth
Cty (In re Mental
Condition of Shirley JC)*
[172 Wis. 2d 371](#)
(Ct. App. 1992)

- 1) Summary judgment NOT an alternative to final hearing procedures

[§_51.20\(5\)](#)

- 2) Must conform to essentials of due process and fair treatment, including

[§_51.20\(12\)](#)

- a. Right to open hearing and to request closed hearing

- Request for closed hearing made on motion of subject, or Atty with subject's approval

St ex rel Wis St J v Cir Ct
[131 Wis. 2d 515](#)
(Ct. App. 1986)

- Ct must hold hearing on question of closure
- Ct must publicly reach decision on closure based on exercise of discretion

- b. Right to counsel

*SY v Eau Claire Cty
(In re Condition of SY)*
[162 Wis. 2d 320](#) (1991)
Pickens v St
[96 Wis. 2d 549](#) (1980)
overruled in part by
St v Klessig
[211 Wis. 2d 194](#) (1997)

- Subject has constitutional right to waive representation by Atty and to proceed in proper person

— Ct must engage in colloquy with subject to establish valid waiver

- c. Right to present and cross-examine witnesses

WJC v Cty of Vilas
(In re WJC)
[124 Wis. 2d 238](#)
(Ct. App. 1985)

- Experts may testify and be cross-examined by telephone

§_753.24(2m)

- Ct may be held with the Judge and any participants appearing from a remote location using telephone or videoconferencing technology subject to §§ 885.50–885.64 and constitutional requirements

d. Right to remain silent

§_51.20(6)

3) For Juvs, hearings held before Juv Ct

§_51.20(5)

- a. Parents have right to participate and be represented by Atty

§_51.20(12)

- b. Hearing closed unless open hearing demanded by Juv through Atty

§_51.20(10)(c)

4) Rules of evidence and civil procedure apply

- a. Unless otherwise provided in [Ch 51](#)

§_807.13(2)

- b. Evidence may be received by telephone subject to conditions in [§_807.13\(2\)](#)

§_753.24(2m)

- c. Ct may be held with the Judge and any participants appearing from a remote location using telephone or videoconferencing technology subject to §§ 885.50–885.64 and constitutional requirements

§_51.20(5)

[SCR](#) 71.01

5) Record must be made as required by [SCR](#) Ch 71

§_51.20(5)

6) Hearing may be held at institution where subject detained, unless subject or Atty objects

Where Ct and facility are 100 or more miles apart, videoconferencing in lieu of personal appearance in Ct is permitted

§_51.20(10)(d)

Marathon Cty v RJO

(In re Commitment)

of RJO)
[2020 WI App 20](#)
[392 Wis. 2d 157](#)
overruled in part on
other grounds by
Waukesha Cty v EJW
[2021 WI 85, ¶ 38 & n.9](#)
[399 Wis. 2d 471](#)

7) If subject fails to appear for hearing, Ct

- a. May issue order for detention, and
- b. Must hold hearing within 7 days after date of detention

§_51.20(10)(c)

8) Ct must disregard any error or defect in proceedings that does not affect substantial rights of either party

H. Proof

§_51.20(13)(e)
Addington v Texas
[99 S. Ct. 1804](#) (1979)

- 1) Petitioner has burden of proving all required facts by clear and convincing evidence
- 2) Must prove subject is proper subject for commitment under standards described at [Sec. 2.](#) above

§_51.20(9)(a)5.
Outagamie Cty v LXD-O
(In re Mental
Commitment of LXD-O)
[2023 WI App 17, ¶ 3](#)
[407 Wis. 2d 441](#)
pet to rev denied

NOTE: An examiner's report need not be admitted into evidence for a Circuit Ct to consider the report during initial commitment proceedings.

§_51.20(9)(a)5.
Outagamie Cty v LXD-O
(In re Mental
Commitment of LXD-O)
[2023 WI App 17, ¶ 35](#)
[407 Wis. 2d 441](#)
pet to rev denied

[Sec. 51.20\(9\)](#) does not apply to recommitment hearings

9. Final Hearing Dispositions

[RMC Form ME-911](#)

[§_51.20\(13\)\(a\)](#)

A. Dismiss petition

St ex rel Sandra D

v Getto

(Gdnship of Sandra D)

[175 Wis. 2d 490](#)

(Ct. App. 1993)

1) If final hearing not timely held

2) If elements not proved

3) If harassment

[§_51.20\(13\)\(a\)](#)

[RMC Form ME-911](#)

B. Order commitment

Langlade Cty v DJW

(In re Mental

Commitment of DJW)

[2020 WI 41](#)

[391 Wis. 2d 231](#)

Note: Circuit courts must make a specific factual finding as to which dangerousness standard has been met under [§_51.20\(1\)\(a\)2.](#)

Sheboygan Cty v MW

(In re Mental

Commitment of MW)

[2022 WI 40](#)

[402 Wis. 2d 1](#)

The remedy when the Circuit Ct commits a *DJW* violation (does not meet the requirements of [§_51.20\(1\)\(a\)2.](#)) is outright reversal. The recommitment order expired and the Circuit Ct lacks competency to conduct any proceedings on remand

1) To DHS if nonresident or inmate of State prison

2) To appropriate Cty Dept

[§_51.20\(13\)\(c\)2.](#)

3) Ct must designate maximum level of inpatient facility that may be used for treatment

JRR v St (In re JRR)

[145 Wis. 2d 431](#)

(Ct. App. 1988)

- a. Ct may not make other treatment decisions

[§_51.42\(3\)\(ar\)4.](#)

[§_51.61\(1\)\(e\), \(f\)](#)

- b. Level must provide least restrictive environment consistent with needs, within the limits of State and federal funds and Cty funds required to match them

- c. Burden of proving funding limitation on Cty

[§_51.20\(13\)\(c\)1.](#)

- 4) Ct must designate facility to receive subject into mental health system

[§_51.20\(13\)\(e\)](#)

- 5) Ct may enter involuntary medication order (see [Sec. 6.B.](#), *supra*, for requirements). Evidence must be clear and convincing

[RMC Form ME-912](#)

[§_51.20\(13\)\(a\)3.](#)

C. Order outpatient treatment only

- 1) If allegations regarding commitment standards proved but inpatient care not required, order commitment to outpatient treatment under appropriate Cty Dept

[§_51.20\(13\)\(c\)](#)

- a. [§_51.42](#) or [§_51.437](#) Dept must arrange for least restrictive treatment and report initial treatment plan to Ct

JRR v St (In re JRR)

[145 Wis. 2d 431](#)

(Ct. App. 1988)

- b. Ct orders maximum level of confinement, but may not set other treatment conditions

[§_51.20\(13\)\(cv\)](#)

D. Prohibit possession of firearms

- 1) Ct must find that the individual is prohibited from possessing a firearm under 18 [USC](#) § 922(g)(4), i.e., has been adjudicated as a mental defective or has been committed to a mental institution

- 2) If Ct makes finding in [para. 1](#)) above, Ct must order person not to possess firearm and either order seizure of any owned firearms or designate another person to store firearm
- 3) Inform individual of penalties under [§ 941.29](#)

[§ 51.20\(13\)\(cv\)4.](#)

- 4) Ct clerk must notify DOJ of order not to possess firearm and of any cancellation of order

[§ 51.20\(13\)\(cv\)1m.](#)

- 5) Individual may petition Ct to cancel order. Ct must grant petition if Ct finds that the individual is not likely to act in a manner dangerous to public safety after considering the circumstances of the commitment and the individual's record and reputation

[SCR 21.17](#)

[SCR 22.35](#)

E. If person found incompetent is Atty

Ct must immediately file a copy of the findings and order with clerk of Supreme Ct and Director of the Office of Lawyer Regulation. Supreme Ct must immediately order Atty to show cause why Atty's license to practice law should not be suspended by reason of medical incapacity

[RMC Form ME-912](#)

F. Authorize conditional release on medication

[§ 51.20\(13\)\(dm\), \(e\)](#)

- 1) In dispositional order, if Ct finds by clear and convincing evidence that dangerousness of subject is likely to be controlled with appropriate medication, Ct may direct agency to conditionally release subject in accord with treatment plan, with one condition being that subject shall take medication prescribed by physician

- a. Subject may give informed consent to medication, OR

[§ 51.61\(1\)\(g\)3., \(h\)](#)

- b. Ct, on motion and finding subject not competent to refuse medication or situation exists in which medication necessary to prevent serious physical harm, may order medications taken involuntarily

[§ 51.61\(1\)\(g\)3m.](#)

[RMC Form ME-914](#)

[RMC Form ME-905](#)

- c. If commitment is under [5th standard](#), Ct shall issue order for involuntary medication and treatment

- d. See [MH 5, Sec. 2.G.](#) for discussion of when subject not competent to refuse psychotropic medication

[§ 51.20\(13\)\(dm\)](#)

- 2) Order may direct that director may request subject be taken into custody under [§_51.39](#) if subject fails to take medication ordered

[§_51.20\(13\)\(a\)2.](#)

G. Conversion. Order temporary guardianship and protective services or placement

- 1) If subject an adult or minor 14 years or more and developmentally disabled, proceed under [§_51.67](#) to determine whether protective placement appropriate

[§_51.67](#)

- a. Ct may appoint a temporary guardian
- b. Ct may order temporary protective placement or services not to exceed 30 days
 - If subject in mental health facility, subject may remain if no other appropriate facility available

[§_51.67](#)

- c. Ct may order psychotropic medication as a temporary protective service, not to exceed 30 days, IF Ct finds probable cause to believe individual is not competent to refuse psychotropic medications, the medications will have a therapeutic value, and they will not impair the individual's ability to participate in subsequent legal proceedings
- d. Individual is not competent to refuse psychotropic medication if, because of serious and persistent mental illness, and after advantages and disadvantages of and any alternatives to accepting particular psychotropic medication have been explained to the individual, one of the following is true:
 - Individual is incapable of expressing understanding of advantages and disadvantages of accepting treatment and alternatives
 - Individual is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to individual's serious and persistent mental illness in order to make informed choice as to whether to accept or refuse psychotropic medication

- 2) See [GA3](#) for procedures for ordering protective placement

H. Length of commitment

[§_51.20\(13\)\(g\)1.](#)

1) Initial commitment not to exceed 6 months

- a. All subsequent consecutive commitment orders, up to 1 year

§_51.20(13)(g)2d.

- 2) After 30th day after commitment under 5th standard, may be treated as outpatient only, but if violates conditions, may be transferred to inpatient not to exceed additional 30 days

§_51.20(13)(h)

- 3) Disposition of Juv may extend beyond age of majority

I. See [MH 5](#) for rights of involuntarily committed persons

§_51.35

10. Transfers While Subject Is Under Commitment

A. Cty Dept under [§_51.42](#) or [§_51.437](#) may transfer subject between treatment facilities or to community and from community to treatment facility if consistent with reasonable medical and clinical judgment

§_51.35(1)(e)1.

B. Subject transferred from outpatient to inpatient status, or to more restrictive environment, may petition Ct in Cty where facility located or committing Ct to review transfer

§_51.35(1)(e)2., 3.

- 1) If transfer for more than 5 days is because of violation of condition of transfer to less restrictive facility, subject entitled to administrative hearing and review within 10 days after transfer

§_51.35(1)(e)4.

- a. Entity seeking transfer has burden of proving requirements in [§_51.35\(1\)\(e\)4.](#)—that subject violated outpatient conditions and that inpatient facility is least restrictive environment consistent with current needs—by preponderance of evidence at hearing before hearing officer

§_51.35(1)(e)5.

- b. Either party may, within 30 days after finding, appeal decision on transfer to Ct in Cty in which facility located or to committing Ct

11. Reexaminations and Extensions

§ 51.20(16)(b)

A. Reexaminations

- 1) Petition for reexamination filed in Cty from which subject committed or Cty in which detained

§ 51.20(16)(j)

- a. Except, petitions filed under [Ch 971](#) (except for [§ 971.17](#)) and [Ch 975](#) filed with committing Ct only
 - See [MH 3](#) for reexamination of criminally committed or transferred subjects

§ 51.20(16)(c)

- 2) If involuntarily committed patient petitions for reexamination, or requests Ct to modify or cancel commitment order, Ct to determine whether to hold hearing
 - a. If commitment hearing has been held within 30 days after filing of petition, no hearing held
 - b. If commitment hearing has NOT been held within 120 days after filing of petition, hearing must be held on petition within 30 days after receipt

St v RRE

[162 Wis. 2d 698](#) (1991)

- Failure to hold hearing within 30 days is not grounds for release
- c. If commitment hearing has been held within 30 to 120 days after filing of petition, Ct has discretion whether to hold hearing
 - d. Ct must order examination within 24 hours after filing of petition if hearing to be held
 - To be completed within 7 days by Cty Dept
 - To be held as described at [Sec. 7.](#) above
- § 51.20(16)(e)
- Ct may order subject be confined in any detention facility for purpose of examination and observation

§ 51.20(16)(g)

3) Hearing

- a. Upon filing of examiners' reports, Ct must schedule hearing
- b. Ct must cause reasonable notice be given petitioner, legal counsel and guardian of subject, and treatment facility
 - May notify any known relative
- c. Procedures for final hearing and disposition govern, insofar as possible

§_51.20(16)(d), (13)(g)3.

- Burden of proof on Cty Dept or other person seeking commitment to establish evidence that subject in need of continued commitment

B. Extensions

Langlade Cty v DJW
(*In re Mental*
Commitment of DJW)
[2020 WI 41](#)
[391 Wis. 2d 231](#)

Note: Circuit courts must make a specific factual finding as to which dangerousness standard has been met under §_51.20(1)(a)2.

Sheboygan Cty v MW
(*In re Mental*
Commitment of MW)
[2022 WI 40](#)
[402 Wis. 2d 1](#)

The remedy when the Circuit Ct commits a *DJW* violation (does not meet the requirements of §_51.20(1)(a)2.) is outright reversal. The recommitment order expired and the Circuit Ct lacks competency to conduct any proceedings on remand

Winnebago Cty v SH
(*In re Mental*
Commitment of SH)
[2020 WI App 46](#), ¶ 17
[393 Wis. 2d 51](#)

Also, “reliance on assumptions concerning a recommitment at some unidentified point in the past, and conclusory opinions parroting the statutory language without actually discussing dangerousness, are insufficient to prove dangerousness in an extension hearing.” (See also footnote 6 of *Winnebago Cty v SH*)

§_51.20(13)(g)3.

- 1) On application for extension of commitment, filed before expiration by DHS or Cty Dept having custody of subject, Ct to schedule hearing

Walworth Cty v MRM
(In re Mental
Commitment of MRM)
[2023 WI 59](#)
[408 Wis. 2d 316](#)

SY v Eau Claire Cty
(In re Condition of SY)
[162 Wis. 2d 320](#) (1991)
Pickens v St
[96 Wis. 2d 549](#) (1980)
overruled in part by
St v Klessig
[211 Wis. 2d 194](#) (1997)

St ex rel Serocki v
Circuit Ct for Clark Cty
[163 Wis. 2d 152](#) (1991)

- a. Circuit Ct may issue an extension order only before the preceding commitment order expires. If that extension order is reversed on appeal, the Circuit Ct's competency to conduct proceedings on remand depends on whether the preceding commitment order has expired
- b. Procedures for final hearing and disposition govern
- c. Subject, in eyes of law, presumed legally competent to waive counsel under normal standard of *Pickens*
 - Ct must engage in colloquy with subject to establish valid waiver
- d. Burden of proof on Cty Dept or other person seeking extension to establish by clear and convincing evidence that subject in need of continued commitment
 - Presumption is that subject competent
- e. No right to substitute on original hearing Judge
 - Request for substitution not timely when recommitment hearing before same Judge who presided at original commitment hearing
 - Original commitment is preliminary contested matter for purposes of [§_801.58\(1\)](#)

Waukesha Cty v SLL
(In re Mental
Commitment of SLL)
[2019 WI 66](#), ¶ 43
[387 Wis. 2d 333](#),
overruled in part by
Waukesha Cty v MAC
(In re Mental
Commitment of MAC)
[2024 WI 30](#)
 ___ Wis. 2d ___
Marathon Cty v RJO
(In re Commitment
of RJO)
[2020 WI App 20](#)
[392 Wis. 2d 157](#)
overruled in part on
other grounds by
Waukesha Cty v EJW
[2021 WI 85](#), ¶ 38 & n.9
[399 Wis. 2d 471](#)

- f. For purposes of personal jurisdiction in a [Ch 51](#) proceeding, an extension for a hearing is a continuation of the original commitment proceeding and previous extension hearings

- Ct may not enter default judgment for recommitment hearings
- Ct may not enter default judgment in involuntary medication hearings under [§ 51.61\(1\)\(g\)3](#).
- Subject individual is entitled to notice of recommitment under [§ 51.20\(10\)\(a\)](#); notice to counsel is not sufficient
- Subject individual is entitled to notice of involuntary medication hearings under [§ 51.61\(1\)\(g\)3](#).; notice to counsel is not sufficient

2) Order

[§ 51.20\(13\)\(g\)3](#).

- a. If Ct determines subject is proper subject for commitment and dangerous, in accordance with commitment standards, Ct must continue commitment

[§ 51.20\(1\)\(am\)](#)
Sauk Cty v SAM
[2022 WI 46](#)
[402 Wis. 2d 379](#)
Portage Cty v JWK
[2019 WI 54](#), ¶ 19
[386 Wis. 2d 672](#)

- If there is a substantial likelihood, based on a subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn, then subject is considered dangerous

Outagamie Cty v CJA
[2022 WI App 36](#), ¶ 14
[404 Wis. 2d 1](#)
 (citing
Portage Cty v JWK
[2019 WI 54](#), ¶ 24
[386 Wis. 2d 672](#))

- Current dangerousness is required and must be proven, despite the fact that the person's supervision and treatment have been effective such that no recent dangerous acts have occurred

— See *Outagamie Cty v CJA* opinion for discussion of jury instructions

Waupaca Cty v KEK
[2021 WI 9](#)
[395 Wis. 2d 460](#)

- [Sec. 51.20\(1\)\(am\)](#) gives counties a realistic basis to prove current dangerousness when it is likely that the committed individual would discontinue treatment if no longer committed. The statute is facially constitutional

[§ 51.20\(13\)\(g\)1.](#)

b. Extensions may be for up to 1 year

GOT v Rock Cty (In re Mental Condition of GOT)
[151 Wis. 2d 629](#)
 (Ct. App. 1989)

3) Commitment may be extended by Ct to accommodate jury request

[§ 51.20\(11\)\(a\)](#)

Not to exceed 14 days after date jury demanded

MH 2: AODA COMMITMENTS

1. Emergency Commitment

[§ 51.45\(12\)\(a\)](#)

A. Standard for emergency commitment

[§ 51.45\(2\)\(f\)](#)

- 1) Intoxicated person (person whose mental or physical functioning substantially impaired as result of use of alcohol, controlled substance, controlled substance analog, or another drug) who
 - a. Has threatened, attempted, or inflicted physical harm on self or another, and
 - b. Is likely to inflict such physical harm unless committed

2) Or person who is incapacitated by alcohol or another drug

§_51.45(2)(d)

- a. Incapacitated by alcohol or another drug means that person, as result of use of or withdrawal from alcohol or another drug, is unconscious, or has judgment so impaired that incapable of making rational decisions
- Incapacity must be evidenced objectively by such indicators as extreme physical debilitation, physical harm, or threats of harm to self, to others, or to property

§_51.45(12)(a)

- Refusal to undergo treatment does not constitute evidence of lack of judgment

§_51.45(2m)

3) Applies equally to minors and adults, except

- a. In proceedings for emergency or involuntary commitment, Ct may appoint GAL for minor, and
- b. Parent or guardian of minor, if known, must receive notice of all proceedings for emergency or involuntary commitment

B. Commencement of action

§_51.45(12)(b)

1) Venue in Cty where person sought to be committed resides or is present

2) Petitioners

- a. Physician, spouse, guardian, or relative of person sought to be committed, or
- b. Any other responsible person

3) Petition must

- a. Allege facts to support need for emergency treatment
- b. Be supported by one or more affidavits that particularize factual basis for allegations

C. Detention order

§_51.45(12)(c)

- 1) Judge or Circuit Ct Comm'r must review petition and supporting affidavits

§_51.45(12)(c)

- 2) If petition and affidavits do not support grounds for commitment, Ct or Circuit Ct Comm'r must dismiss petition

- 3) If petition and affidavits support grounds for commitment, Ct or Circuit Ct Comm'r must

- a. Issue order temporarily committing person to custody of appropriate Cty Dept under §_51.42

- Order is valid pending outcome of preliminary hearing

- b. Issue transportation order, if needed

- If person not detained, order sheriff or other law enforcement agency to take person into protective custody and bring to approved public treatment facility designated by Cty Dept

- c. Ensure that person represented by counsel

- Refer to SPD for appointment of counsel under §_51.60

SY v Eau Claire Cty
(In re Condition of SY)
[162 Wis. 2d 320](#), 331–32
 (1991)

- Adversary counsel need not be separate person

— “[A] party, after having received the imprimatur of the court ..., proceeding in proper person is an adversary counsel engaged in self-representation.”

§_51.45(12)(c)4.

d. Set time for preliminary hearing

- Within 48 hours after receipt of petition, excluding weekends and legal holidays
- May be extended for additional 48 hours exclusive of weekends and holidays on motion by subject or Atty if subject at time unable to assist in defense because incapacitated by alcohol or another drug

D. Subject’s rights while detained

§_51.45(12)(d)

1) Upon arrival at facility, subject must be advised orally and in writing of following

- a. Right to counsel
- b. Right to consult with Atty before request made to undergo voluntary treatment
- c. Right not to converse with examiners or any other personnel
- d. Fact that anything said to examiners or other personnel may be used as evidence against subject at hearings
- e. Right to refuse medication under §_51.61(6)

2) Detainee must also be informed of

- a. Exact time and place of preliminary hearing

b. Reasons for detention

c. Standards under which person may be committed

3) Notice of rights

a. Must be provided to subject's family, if located

b. May be deferred until subject's incapacitated condition has subsided to point at which subject capable of understanding

§_51.45(12)(f)

4) Subject must be given copy of written application for commitment and all supporting affidavits

Superintendent must provide reasonable opportunity for subject to consult Atty

§_51.45(12)(d)

5) No interview with examiners or other personnel until notice given

EXCEPT, detainee may be questioned to determine immediate medical needs

§_51.45(12)(e)

6) Subject may be discharged before preliminary hearing if superintendent of facility determines grounds for commitment no longer exist

7) Under NO circumstances may subject be detained beyond time set for preliminary hearing

a. UNLESS, petition for involuntary commitment filed and finding of probable cause made

- Subject may be detained until involuntary commitment petition heard and determined

E. Subsequent proceedings

- 1) All subsequent proceedings are same as those for involuntary commitment, described in [Sec. 2.](#) below

St v BAS (In re BAS)

[134 Wis. 2d 291](#)

(Ct. App. 1986)

- 2) Emergency commitment authority ends at preliminary hearing; further commitment requires filing of 3-person petition, described in [Sec. 2.B.](#) below

2. Involuntary Commitment

A. Standard for commitment

[§_51.45\(13\)\(a\)](#)

- 1) Condition of person such that
 - a. Person habitually lacks self-control as to use of alcohol beverages or other drugs, AND
 - b. Person uses alcohol beverages or other drugs to extent that health is substantially impaired or endangered, and social or economic functioning substantially disrupted
- 2) Condition evidenced by pattern of conduct dangerous to person or others

B. Commencement of action

[§_51.45\(13\)\(n\)](#)

- 1) Venue where subject resides or is present

[§_51.45\(13\)\(a\)](#)

- 2) Petition shall
 - a. Allege grounds for involuntary commitment exist

- b. State facts sufficient for determination of indigency

Note: Individual need not be found indigent for SPD to appoint counsel.

§_51.45(13)(a)

3) Formal requirements

- a. Petition signed by 3 adults
- b. At least one petitioner must have personal knowledge of subject's conduct and condition
 - Petitioner must file affidavit particularizing factual basis for allegations
- c. Petitioners without personal knowledge of subject's conduct and condition must state basis of belief

C. Detention order on filing of petition

§_51.45(13)(b)

- 1) If petition and affidavits do not support grounds for commitment, Judge or Circuit Ct Comm'r must dismiss petition
- 2) Judge or Circuit Ct Comm'r
 - a. May order temporary commitment of subject to custody of Cty Dept
 - If petition and supporting affidavits meet legal requirements
 - Order valid pending outcome of preliminary hearing

b. May issue transportation order

- If subject not detained, Ct must order sheriff or other law enforcement agency to take subject into protective custody and bring to approved public treatment facility designated by Cty Dept

c. Must ensure subject represented by counsel

- Refer to SPD for appointment of counsel under [§_51.60](#)

[§_51.45\(2m\)](#)

d. May also appoint GAL if subject is minor

[§_51.45\(13\)\(b\)4.](#)

e. Must set time for preliminary hearing

- Within 72 hours after person's arrival at any approved public treatment facility, excluding weekends and legal holidays
- May be extended at subject's or Atty's request for additional 48 hours, excluding weekends and legal holidays

— If at time person unable to assist in defense because incapacitated by alcohol or another drug

[§_51.45\(13\)\(c\)](#)

D. Notification of rights

1) Subject must be informed of following, orally and in writing, if detained before preliminary hearing

a. Right to counsel

b. Right to consult with counsel before request made to undergo voluntary treatment

- c. Right not to converse with examiners or other personnel
- d. Fact that anything said to examiners or other personnel may be used as evidence against subject at hearings
- e. Right to refuse medication under § 51.61(6)
- f. Right to trial by jury
- g. Right to be examined by physician
- h. Reasons for detention
- i. Standards under which person may be committed
- j. Exact time and place of preliminary hearing

2) Notice of rights

- a. Must be provided to subject's family, if located
- b. May be deferred until subject's incapacitated condition has subsided to point at which subject capable of understanding

3) Subject must be given copy of written application for commitment and all supporting affidavits

Superintendent must provide reasonable opportunity for subject to consult Atty

4) No interview with examiners or other personnel until notice given

EXCEPT detainee may be questioned to determine immediate medical needs

3. Preliminary Hearing

§_51.45(13)(b)4.

A. Time constraints

- 1) Held not later than 72 hours after subject arrived at any approved public treatment facility, excluding weekends and legal holidays
- 2) Extension of up to 48 hours, excluding weekends and holidays, may be had
 - a. On motion of subject individual or individual's Atty
 - b. If at time, subject unable to assist in defense because incapacitated by alcohol or another drug

§_51.45(13)(d)

B. Subject to be represented by Atty

Atty must have access to all reports and records (psychiatric and otherwise) that have been made before preliminary hearing

§_51.45(13)(c), (2m)(c)

C. Notice

- 1) Effective and timely notice of preliminary hearing, with copy of petition, supporting affidavits, and standards for commitment given to
 - a. Subject, unless temporarily committed
 - b. Legal guardian if subject adjudicated incompetent
 - c. Subject's Atty

d. Corp Counsel in Cty in which petition is filed

e. Parents, if subject a minor

f. Petitioner

2) Notice must include written statement of subject's rights

a. To an Atty

b. To trial by jury

c. To be examined by physician

[§_51.45\(13\)\(c\), \(d\)](#)

D. Procedure

1) Subject present (in person or by videoconference under [§_51.20\(5\)\(c\)](#)) and afforded meaningful opportunity to be heard

[§_51.45\(13\)\(dm\)](#)

2) Judge or Circuit Ct Comm'r may preside

[§_51.45\(13\)\(p\)](#)

[SCR 71.01](#)

[SCR 71.02](#)

3) Record must be made as required by [SCR](#) Ch 71

E. Findings

[§_51.45\(13\)\(d\)](#)

Probable cause to believe allegations of petition true

F. Disposition

[§_51.45\(13\)\(d\)](#)

- 1) If no probable cause, dismissal

Discharge subject

- 2) If probable cause found, continue temporary commitment of subject to custody of Cty Dept

Recommendation

Consider whether conditional release possible and appropriate

G. Any review of Ct Comm'r finding is discretionary with Circuit Ct

Milwaukee Cty v

Louise M (In re

Commitment of

Louise M)

[205 Wis. 2d 162](#) (1996)

Review may be held at any time before final hearing or trial on matter

4. Final Hearing

[§_51.45\(13\)\(e\)](#)

A. Time constraints

- 1) Within 14 days after finding of probable cause
- 2) Extension of up to 14 days may be granted on showing of good cause, made by subject

B. Notice

[§_51.45\(13\)\(e\)](#)

- 1) Effective and timely notice, including notice of rights and standards for commitment
 - a. To persons listed at [Sec. 3.C.](#) above, and

- b. To superintendent of public treatment facility where subject temporarily committed, and
- c. To immediate family, if located

§_51.45(13)(e)
Cty of Dodge v Michael
JK (In re Michael JK)
[209 Wis. 2d 499](#)
(Ct. App. 1997)

C. Discovery

- 1) At least 96 hours before hearing, excluding weekends and legal holidays, Atty to have access to
 - a. All reports and records, psychiatric and otherwise, made before final hearing, and
 - b. Names of all who may testify in favor of commitment and a summary of proposed testimony
- 2) If right to Atty is waived, subject must have such access

D. Procedures

§_51.45(13)(f)

- 1) Trial to jury unless jury waived

§_756.06(2)(b)

- a. 6-person jury unless 12-person jury requested or ordered

[Wis JI-Cv 7070](#)

- b. Jury makes all findings required for commitment; duration of placement and nature of treatment are judicial decisions

§_51.45(13)(dm)

- 2) Judge to preside

§_51.45(13)(f)

- 3) Final hearing must be open unless subject or Atty moves that it be closed

St ex rel Wis St J v Cir Ct

[131 Wis. 2d 515](#)

(Ct. App. 1986)

- a. Ct must hold hearing on question of closure and must publicly reach decision on closure based on exercise of discretion

[§_51.45\(13\)\(f\)](#)

- b. If closed, only persons in interest, including representatives of Cty Dept, and their Attys and witnesses may be present

- 4) Subject must be present and given opportunity to be examined by Ct-appointed physician

[§_885.60\(1\), \(2\)](#)

Ct may conduct final hearings by videoconferencing, except that if subject objects, subject must be physically present for jury trial, and Ct may order physical presence for non-jury-trial final hearings after considering criteria set forth in [§_885.56](#)

- 5) Subject may appear with Atty, or may waive Atty

- 6) Ordinary rules of evidence apply

[§_51.45\(13\)\(p\)](#)

- 7) Hearing recorded

[§_51.45\(13\)\(f\)](#)

- 8) Ct or jury must consider all relevant evidence

Evidence to include, if possible, testimony of at least one licensed physician who has examined subject

- 9) Ct may order temporary commitment of subject to Cty Dept for up to 5 days for purpose of diagnostic examination if

- a. Subject refused examination, and sufficient evidence to believe allegations of petition true, or

- b. Ct believes more medical evidence necessary

§_51.45(13)(g)

E. Findings necessary for commitment

- 1) Allegations of petition established by clear and convincing evidence
- 2) AND relationship between alcoholic or drug dependent condition and pattern of conduct during 12-month period immediately preceding time of petition dangerous to subject or others

Relationship must be established to a reasonable medical certainty

- 3) AND extreme likelihood that pattern of conduct will continue or repeat self without intervention of involuntary treatment or institutionalization

F. Disposition

§_51.45(13)(g)

- 1) Dismiss, if findings listed in [Sec. E.](#) above not made

§_51.45(13)(g)

- 2) Order commitment to Cty Dept if findings made

§_51.45(13)(h)

- a. Commitment period may not exceed 90 days
- b. Commitment order may be extended once, for not more than 6 months, if standards for recommitment, set forth in [Sec. G.](#) below, met

§_51.45(13)(g)

- 3) May not order commitment unless shown by clear and convincing evidence that
 - a. No suitable alternative available for subject, and
 - b. §_51.42 Dept able to provide appropriate and effective treatment for subject

§_51.45(13)(i)

4) Prohibit possession of firearms

- a. Ct must find that individual is prohibited from possessing a firearm under 18 [USC](#) § 922(g)(4), i.e., has been adjudicated as a mental defective or has been committed to a mental institution
- b. If Ct makes finding in [para a.](#) above, Ct must order person not to possess firearm and either order seizure of any owned firearms or designate another person to store firearm
- c. Inform individual of penalties under [§_941.29](#)
- d. Clerk notifies DOJ of prohibition and of any cancellation of order
- e. Individual may petition Ct to cancel order. Ct must grant petition if Ct finds that the individual is not likely to act in a manner dangerous to public safety after considering the circumstances of the commitment and the individual's record and reputation

[SCR](#) 21.17

[SCR](#) 22.35

- 5) If person found to be alcoholic or drug dependent is Atty, Ct must immediately file a copy of the findings and order with clerk of Supreme Ct and Director of the Office of Lawyer Regulation. Supreme Ct must immediately order Atty to show cause why Atty's license to practice law should not be suspended by reason of medical incapacity

G. Recommitment proceedings

[§_51.45\(13\)\(j\)](#)

- 1) On filing of petition for recommitment, Ct must fix date for hearing within 10 days
- 2) Ct must ensure that subject represented by counsel

Must refer to SPD for appointment of counsel under [§_51.60](#)

- 3) Notice, access to records, names of witnesses, testimony, summaries, hearing procedure, necessary findings, and order same as for initial commitment hearing

[§_51.45\(13\)\(h\)](#)

- 4) Recommitment order valid for up to 6 months, and only one recommitment permitted

5. Right to Refuse Medication and Treatment

A. See [MH 5](#) for general rights of persons committed under [§ 51.45](#)

[§ 51.61\(6\)](#)

B. Minor's rights

- 1) Consent of parent or guardian of minor 14 years or older receiving services for alcoholism or drug abuse, or minor under 14 receiving services for mental illness, developmental disability, alcoholism, or drug abuse required
- 2) Consent of both minor and parent/guardian is required for minor 14 years or older who is receiving services for mental illness or developmental disability

[§ 51.61\(1\)\(g\)](#)

C. Subject has right to refuse medication and treatment if not ordered by Ct in original commitment

- 1) Unless situation exists in which medication or treatment necessary to prevent serious physical harm to subject or others
- 2) OR unless institution files motion for Ct to find subject not competent to refuse medication or treatment; motion to be filed with committing Ct or Ct in Cty where subject located, with notice of motion to subject's Atty, subject, and Corp Counsel
 - a. Report on which motion is based must accompany motion and notice and must include statement signed by licensed physician that asserts
 - Subject needs medication or treatment
 - Subject not competent to refuse medication or treatment

- b. Statement to be based on examination of subject by licensed physician

§_51.61(1)(g)3.

D. Hearing must be held within 10 days after filing of motion

No right to jury trial

E. At request of subject, subject's Atty, or Corp Counsel, hearing may be postponed up to 20 days after motion filed

§_51.61(1)(g)4.

F. Standard

- 1) Individual not competent to refuse medication or treatment if, because of alcoholism or drug dependence, individual incapable of expressing understanding of advantages and disadvantages of accepting medication or treatment and alternatives to accepting particular medication or treatment offered, after advantages, disadvantages, and alternatives have been explained

Virgil D v Rock Cty
(*In re Mental*
Condition of Virgil D)
[189 Wis. 2d 1](#) (1994)

- a. Understanding is sole standard. Not required that patient have insight into condition

KS v Winnebago Cty
(*Mental Condition of KS*)
[147 Wis. 2d 575](#)
(Ct. App. 1988)

- b. Explanation of medically unaccepted and unrecognized alternatives not required

§_51.61(1)(h)

G. Medication may be refused on religious grounds if member of recognized religious organization and religious tenets of such organization prohibit such medications and treatment

1) EXCEPTIONS

- a. If ordered by Ct after hearing

- b. If necessary to prevent serious physical harm to others as evidenced by recent overt act, attempt, or threat to do such harm

- 2) Patient must be informed of right before administration of medications or treatment whenever patient's condition permits

6. Special Provisions for AODA Commitment for Minors

§_51.45(2m)(c)

A. Ct may appoint GAL

§_51.47

B. Parents or guardian must receive notice of all proceedings

§_51.20(5)

C. Parent or guardian of minor subject has right to participate and be represented by Atty at all hearings

§_51.20(6)

D. Hearing before Juv Ct

MH 3: CRIMINAL COMMITMENTS AND TRANSFERS

Note: This chapter does not cover persons committed under [Ch 980](#). See [Criminal Benchbook \(CR 50\)](#) for that information.

§_971.17

1. Criminal Commitment

- A. For discussion of criminal commitments under [§_971.14](#) (not competent to stand trial) and [§_971.17](#) (NGI), see [Criminal/Traffic Benchbook, CR 12 and CR 34](#)

§_51.35(1)(a)

- B. DHS, or Cty Dept under [§_51.42](#) or [§_51.437](#), may transfer care and custody of Def committed under [§_971.14](#) or [§_971.17](#) between treatment facilities or from a facility into the community, subject to [§_51.35](#)

2. Civil Commitment of Inmates of Prison, Jail, or House of Corrections

§_51.20(13)(a)4.

A. State prison inmate

1) If allegations under §_51.20(1)(a) or (ar) proved, Ct may order commitment to DHS and either

- a. Authorize transfer of inmate to State treatment facility or
- b. If inpatient care not needed, authorize treatment on outpatient basis in prison

§_51.20(1)(am)

2) Petition for civil commitment of prison inmate committed under §_971.17, [Ch 975](#), or §_971.14(2) or (5)

- a. If Def subject of treatment for mental illness, developmental disability, or drug dependency immediately before commencement of proceedings as result of commitment order by a Ct under §_971.17 or [Ch 975](#), requirements of recent overt act, attempt or threat to act, a pattern of recent acts or omissions, or recent behavior may be satisfied by showing substantial likelihood, based on Def's treatment record, that Def would be proper subject for commitment if treatment withdrawn
- b. If Def committed under §_971.14(2) or (5) at time proceedings commenced, or discharged from commitment immediately before commencement of proceedings, then acts, attempts, threats, omissions, or behavior of Def during or after time of offense deemed recent for purposes of probable cause

§_51.20(1)(ar)

- c. Petition must include inmate's sentence and expected date of release determined under §_302.11 or §_302.113, whichever is applicable
- d. Petition must have attached to it signed statement by licensed physician or licensed psychologist of State prison, and signed statement by licensed physician or licensed psychologist of State treatment facility attesting either that
 - Inmate needs inpatient treatment at State treatment facility because appropriate treatment not available in prison, or

- Inmate's treatment needs can be met on outpatient basis in prison

§_51.20(1)(ar)

3) Elements for civil commitment of inmate

- a. Inmate is mentally ill, a proper subject for treatment, and in need of treatment, AND
- b. Appropriate less restrictive forms of treatment have been attempted unsuccessfully, AND
- c. Inmate has been fully informed about
 - Inmate's treatment needs
 - Mental health services available
 - Rights under [Ch 51](#)
- d. Inmate has had opportunity to discuss needs, services, and rights with licensed physician or licensed psychologist

§_51.20(1)(ab)

- e. Fact that inmate receives food, shelter, and other care in prison does not constitute reasonable provision for inmate's protection available in community

Winnebago Cty v CS

[2020 WI 33](#)

[391 Wis. 2d 35](#)

- 4) [Sec. 51.61\(1\)\(g\)3.](#) is facially unconstitutional for any inmate who is involuntarily committed under [§_51.20\(1\)\(ar\)](#), which does not require a determination of dangerousness, when the inmate is involuntarily medicated based merely on a determination that the inmate is incompetent to refuse medication

§_51.20(13)(a)4m.

B. Cty jail or house of corrections inmate

- 1) Commitment procedure and petition same as any involuntary commitment

§_51.20(13)(a)4m.

- 2) If allegations proved, Judge must order commitment to Cty Dept under [§_51.42](#) or [§_51.437](#) of inmate's Cty of residence

§_51.20(13)(a)5.

If inmate is nonresident, commitment to DHS

§_51.20(13)(a)4m.

- 3) Order must authorize either
 - a. Transfer of inmate to State or Cty treatment facility, or
 - b. Authorize outpatient treatment in jail or house of corrections

3. Transfers of Criminally Committed Defendants

§_51.37(4)

A. DHS may, with approval of committing Ct and Cty Dept under §_51.42 or §_51.437, and subject to §_51.35, transfer to Cty Dept the care and custody of Def

- 1) Who was committed under §_971.14 or §_971.17 to an institution of DHS, and
- 2) Whose mental condition is such that further care required and can be properly provided under direction of appropriate Cty Dept

§_51.35(1)(e)1.

B. Def transferred from outpatient to inpatient status, or to more restrictive environment, may petition Ct in Cty where facility located or committing Ct to review transfer

§_51.35(1)(e)2.

- 1) If transfer for more than 5 days is because of violation of condition of transfer to less restrictive facility, Def entitled to administrative hearing and review

§_51.35(1)(e)4.

- a. Entity seeking transfer has burden of proving requirements in §_51.35(1)(e)4. by preponderance of evidence at hearing before hearing officer

§_51.35(1)(e)5.

- b. Either party may, within 30 days after finding, appeal decision on transfer to Ct in Cty in which facility located or to committing Ct

§_51.37(5)

4. Transfers of Inmates from Prison, Jail, or House of Corrections

A. Emergency transfer

§_51.37(5)(b)

- 1) DOC may authorize emergency transfer of inmate to State treatment facility if cause to believe inmate is mentally ill, drug dependent, or developmentally disabled and exhibits conduct that constitutes danger of physical harm to self or others or mentally ill and satisfies the standard under §_51.20(1)(a)2.e. or is dangerous and is an alcoholic or a person who is drug dependent and
- 2) If there is cause to believe that an individual is in active psychosis and exhibits conduct that constitutes a danger of physical harm to self or to others and the individual remains in active psychosis for more than 72 hours and has not been stabilized, the DOC shall authorize the emergency transfer of the individual from a prison, and the sheriff or other keeper of a jail or other criminal detention facility shall authorize the emergency transfer of the individual from a jail or other criminal detention facility to a state treatment facility or, if the individual has been sentenced to prison, to the Wisconsin Resource Center established under §_46.056. Transportation expenses shall be paid by the DOC
 - a. The correctional custodian of the sending institution and the attending health-care professional of the sending institution shall jointly execute a statement of emergency detention or petition for emergency commitment for the individual and deliver it to the receiving state treatment facility or the Wisconsin Resource Center established under §_46.056
 - b. DHS must file statement or petition from sending institution conforming with §_51.15(4) or (5) or §_51.45(12)(b) with Ct within 24 hours after receiving inmate for detention
 - c. If Def not returned to institution, director of receiving facility must file petition (§_51.20(1) or §_51.45(13)) or use emergency detention procedure (§_51.15 or §_51.45(12)), EXCEPT, no inmate may be released without approval of committing Ct

§_51.35(3)(a)

5. Transfers of Persons from Secured Juvenile Facilities

§_51.35(3)(a)

See also

[Juvenile Benchbook](#)

A. Pre-Ct procedure for voluntary transfer

- 1) Report, in writing, made to superintendent of juvenile correctional facility or secured residential care center for children and youth by licensed psychologist of juvenile correctional facility or secured residential care center for children and youth or by licensed physician of Cty Dept under §_938.02(2g) or DOC

- a. Stating person in need of services for developmental disability, alcoholism, or other drug dependency or in need of psychiatric services
- b. Stating nature and basis of belief

2) Person must voluntarily consent

- a. If minor 14 or older and in need of developmental disability services or psychiatric services, minor and minor's parent or guardian must consent
 - Unless Ct approves admission under [§_51.13\(1\)\(c\)](#), OR
 - Unless minor refuses to consent, in which case minor's parent or guardian may consent on minor's behalf
- b. If minor 14 or older and in need of services for alcoholism or drug dependency, or if minor under 14 and in need of services for developmental disability, alcoholism, or drug dependency, or in need of psychiatric services, parent or guardian must consent
 - Unless Ct approves admission under [§_51.13\(1\)\(c\)](#)

3) Superintendent to inform minor and parent or guardian orally and in writing

- a. That transfer being considered
- b. Basis for request
- c. Rights under [§_51.13\(3\)](#)

4) If Cty Dept or DOC determines request appropriate, Cty Dept or DOC must immediately notify DHS and may immediately transfer minor, if DHS consents

a. DHS must file petition under [§_51.13\(4\)\(a\)](#) in Juv Ct of Cty where treatment facility located

- See [MH 4](#) for petition requirements and procedure

[§_51.35\(3\)\(b\)](#)

B. Ct procedure for voluntary transfer

1) Ct must determine, based on allegations of petition and accompanying documents

a. Whether transfer to inpatient facility is appropriate and consistent with needs of minor

b. Whether consent for transfer was provided by minor and parent or guardian or whether minor was admitted under [§_51.13\(1\)\(c\)](#), if minor is 14 or over and transfer is for purpose of receiving developmental disability services or psychiatric services

2) If Ct cannot make determination based on allegations of petition and accompanying documents

a. Ct may order additional information (including independent evaluation), if needed, and

- Make determination within 14 days after admission, OR
- Hold hearing within 14 days after admission

3) If face of petition notes minor's nonconsent to transfer, if transfer was made under consent of minor's parent or guardian despite minor's refusal, or if hearing requested by minor or minor's Atty, GAL, parent, or guardian, Ct must

a. Order independent evaluation of minor

b. Hold hearing

c. Appoint Atty or GAL for minor (if none)

4) At conclusion of hearing, Ct must approve or disapprove request for transfer

If minor under continuing jurisdiction of Ct in different Cty, Ct may transfer case to that Ct

[§_51.35\(3\)\(c\)](#)

C. Procedure for involuntary transfer

1) Licensed psychologist of juvenile correctional facility or secured residential care center for children and youth or licensed physician of Cty Dept under [§_938.02\(2g\)](#) DOC must file report with superintendent stating nature and basis of belief that person is

a. Mentally ill, drug dependent, developmentally disabled, or an alcoholic and dangerous as described in [§_51.20\(1\)\(a\)2](#). OR

b. Dangerous and an alcoholic or a person who is drug dependent as described in [§_51.45\(13\)\(a\)](#)

2) If superintendent determines transfer appropriate,

Petition filed under [§_51.20](#) or [§_51.45](#)

3) Ct must hold hearing according to procedures in [§_51.20](#) (see [MH 1](#)) or [§_51.45\(13\)](#) (see [MH 2](#))

D. Emergency transfers

[§_51.35\(3\)\(c\)](#)

1) DHS must file statement or petition with Ct within 24 hours after individual transferred

2) If individual not returned to juvenile correctional facility or secured residential care center for children and youth, director of receiving facility must file petition ([§_51.20\(1\)](#) or [§_51.45\(13\)](#)) or use procedure in [§_51.15](#) or

§_51.45(12)

EXCEPT, MAY NOT release without approval of Ct that directed confinement in juvenile correctional facility or secured residential care center for children and youth

6. Reexamination of Transferees

§_51.37(8)(a)

A. Right to reexamination under §_51.20(16) applies to prison, jail, or house of corrections inmate found to be mentally ill or drug dependent

1) EXCEPT, petition must be made to

a. Ct that made finding or,

b. If inmate detained by transfer, to Circuit Ct of Cty in which detained

2) Right DOES NOT APPLY to

a. Defs committed under §_971.17

b. Inmates found alcoholic and dangerous

B. If upon rehearing, Ct finds standards for recommitment under §_51.20(13)(g) no longer apply or inmate not in need of psychiatric or psychological treatment

1) Inmate returned to prison, jail, or house of correction, or

2) Inmate discharged if past release date as determined under §_302.11 or §_302.113, whichever is applicable

§_51.37(8)(b)

C. Treatment beyond date of release

- 1) If condition of any transferred inmate requires psychiatric or psychological treatment after date of release (as determined under [§_302.11](#) or [§_302.113](#), whichever is applicable)
 - a. Director of State treatment facility to, within reasonable time before release date, make written application to Ct that involuntarily committed person
 - b. Proceeding to be upon application made under [§_51.20](#), but no physician or psychologist connected with State prison, WMHI, MMHI, Cty jail, or house of corrections may be appointed examiner
- 2) If Ct does not commit inmate, Ct may dismiss application and order inmate returned to institution from which transferred until release date
- 3) If Ct commits inmate for period commencing upon release date, commitment to care and custody of appropriate Cty Dept

MH 4: VOLUNTARY MENTAL ADMISSIONS/ SETTLEMENTS

[§_51.10\(1\), \(2\), \(4\)](#)

1. Purely Voluntary Admissions

A. Most voluntary admissions for mental illness, developmental disability, and drug dependence are accomplished without Ct involvement, on application of subject

[§_51.10\(4\)](#)

- 1) Criteria for voluntary admission as inpatient

a. Subject is

- Mentally ill, or
- Developmentally disabled, or
- Alcohol or drug dependent AND

b. Subject has potential to benefit from inpatient care, treatment, or therapy

2) No requirement of dangerousness

§_51.10(5)

3) Subject has right to leave on written request to staff

a. At time of admission, subject must be informed orally and in writing of right

b. Right applies EXCEPT if statement of emergency detention filed under §_51.15 by director of treatment facility or designee

§_51.10(3)

§_51.45(10)(a)

4) Adult alcoholics and adults who are drug dependent may apply for voluntary treatment directly to facility

§_51.45(10)(a)

a. If subject incompetent who HAS NOT been deprived of right to contract, subject or legal guardian or other legal representative may make application

§_51.45(10)(a)

b. If subject incompetent who HAS been deprived of right to contract, legal guardian or other legal representative may make application

§_51.10(6)

2. Conversion from Involuntary Commitment Proceedings

A. Ct may permit person against whom petition for involuntary commitment filed, under §_51.15 or §_51.20, to become voluntary inpatient at treatment facility

- 1) If subject signs application, and
- 2) If director of appropriate Cty Dept under §_51.42 or §_51.437 and director of admitting facility approve within 30 days after admission
- 3) Judge must dismiss §_51.20 proceedings within 30 days after admission
 - a. If subject still voluntary patient, or
 - b. If subject discharged by treatment director
 - Whichever comes first

B. Settlement agreements

§_51.20(8)(bg)

- 1) Subject of involuntary commitment petition or Atty with subject's consent may waive time periods for probable cause hearing or final hearing or both for up to 90 days if subject and Corp Counsel agree that subject must obtain treatment under settlement agreement

*Schaidler v
Mercy Med Ctr*
[209 Wis. 2d 457](#)
(Ct. App. 1997)

- 2) Settlement agreement must be in writing, be approved by Ct, and include treatment plan submitted by Corp Counsel
 - a. Treatment plan must provide for treatment in least restrictive manner
 - b. Either party may ask Ct to modify treatment plan at any time during 90-day period
- 3) Ct must designate Cty Dept to monitor subject's treatment under and compliance with agreement

- 4) If subject fails to comply with treatment according to agreement, Cty Dept must notify both counsel of noncompliance

§_51.20(8)(bm)

C. Noncompliance with settlement agreement

- 1) If subject fails to comply with settlement agreement, Corp Counsel or counsel designated by multi-cty Dept may file statement of facts that constitute basis for belief subject not in compliance
 - a. Statement sworn to be true
 - b. Statement may be based on information and belief of filer

- 2) Upon receipt of statement of noncompliance, Ct may issue order to detain individual pending final disposition

- a. If individual detained, Ct must

§_51.20(8)(bm)

- Hold probable cause hearing within 72 hours from time that person is taken into custody under §_51.15 (excluding weekends and legal holidays)
- Hold final hearing within 14 days if probable cause hearing held before settlement agreement

— If jury trial requested later than 5 days after detention but not less than 48 hours before final hearing, final hearing held within 21 days after detention

- b. Facts alleged as basis for commitment before waiver of time period may be basis for finding of probable cause

§_51.20(8)(c)

- 3) During detention, physician may order medication and treatment permitted under §_51.61(1)(g) and (h)
 - a. Subject may consent to treatment but only after informed of right to refuse treatment and written consent to such treatment signed
 - b. Report of all treatment provided, along with any written consent, must be filed with Ct by director of treatment facility or designee
 - EXCEPT, individual for whom probable cause finding made under §_51.61(1)(g) that not competent to refuse medication may NOT consent to medication

D. Noncompliance hearing

§_51.20(8)(br)

- 1) Upon motion of subject, Ct must hold hearing on issue of noncompliance with settlement agreement within 72 hours from time motion filed with Ct (excluding weekends and legal holidays)

Hearing may be held as part of probable cause or final hearing if probable cause or final hearing held within 72 hours from time motion filed with Ct (excluding weekends and legal holidays)

- 2) At hearing, written statement submitted shall be prima facie evidence that violation of conditions of agreement occurred

If subject individual denies any of facts in statement, then individual has burden of proving facts false by preponderance of evidence

3. Nonprotesting Admissions

§_51.10(4m)(b)

A. Without signing application, person may be presumed to be voluntarily admitted for up to 7 days when

- 1) Subject meets criteria for voluntary admission and admission approved by director of Cty Dept and director of admitting facility
- 2) Physician of facility submits signed request for admission of subject, with properly executed certification of notice of rights
- 3) Subject fails to indicate desire to leave facility, but refuses or unable to sign application for admission

§_51.10(4m)(c)

- a. Facility must notify Ct on first Ct day following admission
- b. Ct must appoint GAL within 24 hours after receiving notice, excluding weekends and holidays

§_51.10(4m)(d)

B. Ct hearing held if subject has not signed voluntary admission application within 7 days after admission

- 1) Before Judge or Circuit Ct Comm'r of Probate Ct in Cty where facility located
- 2) Purpose to determine whether subject to remain as voluntary patient
- 3) Subject, GAL, and physician who signed admission request must appear
- 4) If Judge or Circuit Ct Comm'r determines subject wishes to leave facility, subject must be discharged

§_51.10(4m)(d), (5)(c)

C. Facility may initiate involuntary commitment proceedings if it has reason to believe subject eligible for such commitment

4. Special Provisions for Minors

§_51.20(5)

A. At any hearing required under [Ch 51](#), parent or guardian of minor has right to participate in hearing and be represented by Atty

§_51.138

B. Emergency outpatient treatment for minors

§_51.45(10)(am)

C. Outpatient treatment for AODA

§_51.47(1)

- 1) Minor 12 or over, without parental notice or consent, may apply for
 - a. Outpatient and follow-up treatment for AODA, or
 - b. Prevention and intervention services
- 2) Minor under 12 may apply for AODA services above without parental notice or consent, only

- a. If parent with legal custody or guardian of minor cannot be found
- b. If there is no parent with legal custody of minor

§_51.47(2)

- 3) Physician or health-care facility must obtain consent of minor's parent or guardian before

§_51.47(2)(a)

- a. Performing any surgical procedure on minor
 - Unless procedure essential to health of minor and consent of parent or guardian not readily available

§_51.47(2)(b)

- b. Administering any controlled substance
 - Except to detoxify minor

D. Voluntary outpatient treatment for mental illness

§_51.14(3), §_51.61(6)

- 1) Minor 14 or older AND parent or guardian must execute written informed consent before outpatient treatment

- a. Parent or guardian of minor under 14 must execute written informed consent
 - If consent was executed despite minor's refusal, treatment director of facility shall file petition for review of the informed consent

- 2) If parent or guardian of minor over 14 refuses to provide consent, minor over 14 or a person acting on behalf of the minor may petition mental health review officer in Cty where parent or guardian resides for review of lack of consent and hearing

§_51.14(3)(a)

- 3) If consent of a parent or guardian of the minor is not obtained during the 30-day treatment period as described in §_51.138(3), the treatment director shall file a petition to initiate review of outpatient mental health treatment of a minor receiving treatment under §_51.138

§_51.14(3)(f)

- 4) Petition for Ct review may be filed directly by minor over 14 with Juv Ct in Cty of residence of minor's parent or guardian

- a. Before mental health review officer hearing if
 - Minor over 14 requests, and
 - Mental health officer determines it would be in best interest of minor

§_51.14(4)(a)

- b. Within 21 days after issuance of order by mental health review officer

§_51.14(3)(b), (4)(b)

5) Petition must state

- a. Name, address, and birth date of minor
- b. Name and address of parents or guardian
- c. Facts substantiating petitioner's belief minor needs or does not need outpatient mental health treatment
- d. Any information substantiating appropriateness of particular treatment sought and that it is least restrictive

§_51.14(4)(c)

6) If minor refused to consent, Ct must appoint Atty for minor at least 7 days before hearing

- a. If parent or guardian refused to consent, Ct must appoint Atty for minor, if unrepresented, IF
 - Minor requests, or
 - Ct determines it in best interest of minor

§_51.14(4)(d)

7) Hearing held within 21 days after petition filed

§_51.14(4)(e)

- a. Notice by Ct by certified mail to
 - Minor

- Parent or guardian
- Minor's Atty and GAL
- Any other interested party

b. Notice given at least 96 hours before hearing

§_51.14(4)(f)

8) Hearing procedure

- a. Rules of evidence apply
- b. On the record
- c. Burden of proof is clear, satisfactory, and convincing

§_51.14(4)(g)

9) After hearing, Ct must issue written order

- a. Informed consent of minor or parent or guardian NOT required for outpatient mental health treatment of minor if Ct finds all of the following
 - Informed consent unreasonably withheld
 - Minor in need of treatment
 - Particular treatment sought appropriate and least restrictive
 - Treatment in best interest of minor

§_51.47

E. Voluntary admission to inpatient facility for AODA

§_51.47(2)(c)

- 1) Physician must obtain consent of parent or guardian before admitting minor 12 or over to inpatient facility

Unless to detoxify

- 2) Physician or health-care facility must

§_51.47(2)(d)

- a. Obtain parent or guardian consent if inpatient detoxification extends beyond 72 hours

§_51.47(3)

- b. Notify parent or guardian of any services rendered as soon as practicable

F. Admission to approved inpatient facility for minors

§_51.13(1)(a)

- 1) If a minor is under 14, the application for admission to an approved inpatient treatment facility for primary purpose of treatment for mental illness, developmental disability, alcoholism, or drug abuse must be executed by parent with legal custody or by guardian. Any statement or conduct indicating that the minor does not agree must be noted on the application

§_51.13(1)(b)

- 2) If a minor is 14 or older, the application for admission to an approved inpatient treatment facility for primary purpose of treatment for mental illness or developmental disability “shall be executed” by the minor and parent with legal custody or guardian

§_51.13(1)(b)

If minor refuses to sign application, a parent who has legal custody of minor or minor’s guardian may sign application on minor’s behalf and a petition under [Sec. 4.G.](#), *infra*, “shall be filed”

§_51.13(1)(bm)

- 3) If a minor is 14 or older, the application for admission to an approved inpatient facility for the primary purpose for treatment of alcoholism or drug abuse, “shall be executed” by minor and parent with legal custody or guardian. Any statement or conduct indicating that the minor does not agree must be noted on the application, and in the petition required under [Sec. 4.G.](#), *infra*

§_51.13(1)(c)

4) If a minor wishes to be admitted to an approved inpatient treatment facility, a petition under [Sec. 4.G., *infra*](#), may be filed by the minor or by a person acting on behalf of the minor (and the Ct may temporarily approve the admission pending a hearing) under any of the following circumstances:

- a. A parent with legal custody or guardian cannot be found,
- b. There is no parent with legal custody or guardian, or
- c. A parent with legal custody or guardian of a minor 14 or older refuses to sign the application

[§_51.13\(1\)\(d\)](#)

5) Ct may permit minor against whom petition filed under [§_51.15](#), [§_51.20](#), or [§_51.45\(12\)](#) or (13) to become patient

[§_51.13\(4\)\(a\)](#)

G. Review procedure for petitions required under [§_51.13\(1\)](#) for admission of minor to inpatient treatment facility

1) Within 3 days after admission, or within 3 days after application for admission is executed (whichever comes first), treatment director or designee must file verified petition for review of admission with Juv Ct in Cty where facility located. A copy of the application must be attached to the petition

[§_51.13\(4\)\(b\)](#)

If undue hardship AND in best interest of minor, Ct may remove (transfer) petition to Juv Ct of Cty of residence of parent or guardian

[§_51.13\(4\)\(a\)](#)

2) Contents of petition

- a. Name, address, and birth date of minor
- b. Names and addresses of parents or guardian
- c. Facts substantiating the minor's need for treatment

- d. Facts substantiating appropriateness of inpatient treatment
- e. Basis for petitioner's opinion that inpatient care least restrictive treatment consistent with needs of minor
- f. Notation of any refusal by a minor 14 or older to join the in the application

§_51.13(4)(c)

- 3) Copy of petition sent to minor and, if available, to parents or guardian within 5 days after minor's admission

§_51.13(4)(d)

H. Disposition in review of admission of minor for mental illness, developmental disability, alcoholism, or drug abuse

- 1) Within 5 days after filing of petition, Ct must determine whether
 - a. Admission was made under application executed by minor and parent or guardian (if minor is 14 or older), AND
 - b. There is prima facie showing that
 - Minor in need of psychiatric services, services for developmental disability, alcoholism, or drug abuse
 - Treatment facility offers appropriate services
 - Inpatient treatment is least restrictive
- 2) If showing made, Ct must permit admission
- 3) If showing not made, Ct may
 - a. Dismiss petition AND do one of following

§_51.13(4)(d)

§_51.13(4)(h)

- Order application for admission denied and minor released
- Order petition treated as petition for involuntary commitment and refer it to Juv Ct for hearing under §_51.20 or §_51.45(13)
- If minor 14 or older and appears to be developmentally disabled, Ct to proceed under §_51.67 for guardianship and protective placement or services

— EXCEPT temporary guardian not needed if minor has parent or guardian

- If minor appears to need protection or services under §_48.13 or §_938.13, or if minor is expectant mother of unborn child in need of protection or services under §_48.133, dismiss petition and authorize filing of petition under §_48.25(3) or §_938.25(3), OR

§_51.13(4)(d)

- b. Order additional information, including an independent evaluation, to be produced as necessary for Ct to make determinations under §_51.13(4)(d) within 7 days (exclusive of weekends and holidays) after admission or application for admission, whichever is sooner, OR

§_51.13(4)(d)

- c. Hold hearing within 7 days (exclusive of weekends and holidays) after admission or application for admission, whichever is sooner

- 4) If showing not made under [Sec. 4.H.1](#)), *supra*, Ct shall order independent evaluation and hold hearing on application within 7 days (exclusive of weekends and holidays) of admission or application for admission, whichever is sooner, **if**

- a. The application was executed by the minor's parent or guardian over the objections of the minor, or
- b. Hearing is requested by minor, minor's counsel, parent, or guardian
- c. Before hearing under [para. 4\)](#) *supra*, Ct shall appoint counsel, and, if necessary, GAL for minor
- d. Minor shall be informed about how to contact State protection and advocacy agency designated under [§ 51.62\(2\)\(a\)](#)

[§ 51.13\(4\)\(e\)](#)

- e. Notice of the hearing shall be by certified mail to the interested parties at least 96 hours before the hearing

[§ 51.13\(4\)\(f\)](#)

- f. At the hearing
 - Rules of evidence in civil actions apply
 - A record must be maintained
 - The record shall contain findings of fact and conclusions or law
 - Findings must be based on clear and convincing evidence
- g. After the hearing, the Ct may deny the admission and proceed under [Sec. H.3\)](#), *supra*

[§ 51.13\(4\)\(g\)](#)

- h. After the hearing, the Ct shall permit the admission if
 - The minor needs treatment

- The inpatient facility offers the appropriate treatment
 - The facility offers the least restrictive treatment
- i. After the hearing, if the Ct finds that the facility is not appropriate or not the least restrictive for treatment of mental illness or developmental disability, it can order transfer to a more appropriate or less restrictive facility if approved by all of the following:
- If for the primary purpose of treatment for mental illness or developmental disability, by any of the following:
 - Parent who has legal custody or guardian if minor is under 14
 - Minor, if 14 or older, and parent or guardian; if minor refuses approval, approval can be given by parent or guardian on minor's behalf
 - Minor if admitted under [§ 51.13\(1\)\(c\)](#)
 - Treatment director of the facility or designee
 - Director of the Cty Dept responsible for the cost of the treatment
 - DHS if placement is at a center for the developmentally disabled

[§ 51.13\(5\)](#)

- 5) Any person aggrieved by the order under [§ 51.13](#) may appeal to the Ct of Appeals under [§ 809.30](#)

§ 51.13(7)(a)

- 6) If minor voluntarily admitted before age 14 turns 14 and still needs treatment, treatment director must ask minor and parent or guardian to execute voluntary admission. If minor refuses, parent or guardian may sign on minor's behalf
 - a. Petition for review to be filed as in [Sec. G.](#), *supra*, unless such review held within last 120 days
 - b. If application not executed by minor's 14th birthday, minor must be discharged unless petition or statement filed for emergency detention, emergency commitment, involuntary commitment, or protective placement by end of next day in which Ct transacts business

§ 51.13(7)(b)

- 7) The Ct shall hold a hearing as provided in [Sec. H.4](#)), *supra*, if a request for discharge of a minor is filed
 - a. The hearing is not necessary if there was a hearing on the admission within 120 days before the filing of the request
 - b. The hearing shall be held within 14 days after receipt of the request unless the parties agree to a longer time period
 - c. After the hearing, the Ct shall dispose of the matter as provided in [Sec. H.4](#))g., [h.](#), [i.](#), *supra*

MH 5: PATIENTS' RIGHTS AND RECORDS

1. Applicability

§ 51.61(1)

A. Applies to any person

1) Receiving services for mental illness, developmental disabilities, alcoholism, or drug dependency, including any person

- a. Admitted to treatment facility under [Ch 48](#), [Ch 51](#), [Ch 55](#), [Ch 971](#), [Ch 975](#), or [Ch 980](#)

[§ 51.61\(1\)\(cm\)](#), (i)
Thielman v Leean
[2003 WI App 33](#)
[260 Wis. 2d 253](#)

Note: Not all rights apply to [Ch 980](#) commitments—e.g., right not to be shackled (for security-related reasons).

- b. Transferred to treatment facility under [§ 51.35\(3\)](#) or [§ 51.37](#)

- c. Receiving care and treatment for above conditions through DHS or Cty Dept under [§ 51.42](#) or [§ 51.437](#)

[§ 51.61\(1\)](#)

B. Does not include persons

- 1) Committed under [Ch 975](#) and transferred to or residing in any State prison

- 2) Admitted to an emergency room or receiving outpatient hospital treatment

Volden v Koenig
[2001 WI App 290](#)
[249 Wis. 2d 284](#)

- 3) Temporarily detained by a sheriff pending hearing on involuntary commitment or under [Ch 980](#)

- a. They are not patients

- b. Jail is not a treatment facility

[§ 51.61\(3\)](#)

C. Applies to subjects receiving services in outpatient and day-service facilities, as applicable

[§_51.61\(1\)\(a\)](#)

D. On admission, commitment, or transfer, patient must be informed orally and in writing of rights

- 1) Copies of statute ([§_51.61](#)) must be posted conspicuously in each patient area
- 2) Copies must be available to patient's guardian and immediate family

2. Rights

[§_51.61\(1\)\(b\)](#)

A. Right to refuse to perform labor of financial benefit to facility where patient receiving treatment or service

- 1) Patient may perform compensated labor voluntarily if
 - a. Part of treatment plan
 - b. Supervised by staff member qualified to oversee therapeutic aspects of activity
 - c. Patient has given written informed consent
 - Payment may not be applied to costs of treatment without informed, written consent of patient
 - Does not apply to individuals serving criminal sentence transferred under [§_51.37\(5\)](#) from State correctional institution to treatment facility
 - d. Facility staff evaluates appropriateness of labor at least once every 120 days
- 2) May perform uncompensated labor voluntarily if

- a. Facility has attempted to provide compensated labor as first alternative
- b. Uncompensated labor does not cause layoffs of staff
- c. Patient not required to perform such labor

§_51.61(1)(cm)

B. Unrestricted right to send and receive sealed mail to or from

- 1) Legal counsel
- 2) Cts
- 3) Govt officials
- 4) Private physicians and licensed psychologists
- 5) Right includes having reasonable access to letter-writing materials, including postage stamps

§_51.61(1)(cm)2.

Note: Not all rights apply to [Ch](#) 980 commitments.

C. Right to send and receive sealed mail to or from other persons, subject to physical examination in patient's presence

- 1) If reason to believe such communication contains contraband materials or objects that threaten security of patients, prisoners, or staff

Reasons to be written in person's treatment record

- 2) Officers and staff may not read patients' mail

§_51.61(1)(d)

D. Right to petition Ct for review of commitment order, withdrawal of order, or release from commitment as provided in §_51.20(16)

Except if committed for alcoholism

§_51.61(1)(e)

E. Right to least restrictive conditions

- 1) Right does not apply to admissions or transfers from prisons, jails, house of corrections, or secured Juv facilities
- 2) Limited to programs, services, and resources reasonably provided by Cty within limits of State, federal, and required matching funds

§_51.61(1)(f)

F. Right to treatment

- 1) Limited to treatment that Cty reasonably able to provide within limits of State, federal, and required matching funds

Comment

- a. Previous statute gave unlimited right to prompt and adequate treatment

§_51.61(1)(g)

G. Right to refuse medication and treatment

§_51.61(1)(fm)

[Wis Adm Code](#)

§ DHS 94.03

- 1) Includes right to be informed of treatment and care and participate in plan
- 2) May give informed consent if competent

§_51.59(1)

- 3) Not incompetent merely because mentally ill

[§_51.20\(1\)\(a\)2.e](#)

- 4) Patient not competent to refuse if mentally ill and after advantages and disadvantages of and alternatives to accepting psychotropic medication explained, either
 - a. Individual is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment and the alternatives, or
 - b. Individual is substantially incapable of applying an understanding of the advantages and disadvantages of and alternatives to individual's chronic mental illness in order to make an informed choice as to whether to accept or refuse psychotropic medication

[§_51.61\(1\)\(g\)1.](#)

- 5) May NOT refuse when
 - a. Necessary to prevent serious physical harm to self or others OR
 - b. Has been ordered by Ct
 - An order for commitment under 5th standard is sufficient

[§_51.61\(1\)\(g\)2.](#)

- c. Ct may order if, before final commitment, Ct finds probable cause, after a hearing that
 - Subject not competent to refuse
 - Medication/treatment will have therapeutic value
 - Medication/treatment will not unreasonably impair subject's ability to participate in subsequent legal proceeding

[§_51.61\(1\)\(g\)3.](#)

*Outagamie Cty
v Melanie L
(In re Mental
Commitment of
Melanie L)*

[2013 WI 67](#)
[349 Wis. 2d 148](#)

- d. Committing Ct may order, if after final commitment, Ct finds by clear and convincing evidence, that subject not competent to refuse

Carol JR v Cty of Milw
(In re Carol JR)
[196 Wis. 2d 882](#), 890
 (Ct. App. 1995)

- e. Hearing may be held before Ct Comm'r

Note

Waukesha Cty v MAC
(In re Mental
Commitment of MAC)
[2024 WI 30](#)
 ___ Wis. 2d ___

- Ct may not enter a default judgment in involuntary medication hearings under [§_51.61\(1\)\(g\)3](#).
- Subject individual is entitled to notice of involuntary medication hearings under [§_51.61\(1\)\(g\)3](#).; notice to counsel is not sufficient

[§_51.61\(1\)\(h\)](#)

H. Right to be free from unnecessary or excessive medication at any time

- 1) No medication administered except at written order of physician
- 2) Record of medication must be kept in patient's medical records
- 3) Medication may not be used
 - a. As punishment
 - b. For convenience of staff

- c. As substitute for treatment program
 - d. In quantities that interfere with patient's treatment program
- 4) Medication may be refused on religious grounds if member of recognized religious organization and religious tenets of such organization prohibit such medication and treatment
- a. EXCEPT if ordered by Ct after hearing
 - b. EXCEPT if necessary to prevent serious physical harm to others as evidenced by recent overt act, attempt, or threat to do such harm
 - c. Individual must be informed of right before administration of medication or treatment whenever patient's condition permits

§_51.61(1)(i)

I. Right to be free from physical restraint and isolation except for emergency situations or when isolation or restraint part of treatment program

§_51.64(1)(a)

- 1) Physical restraint includes all the following
 - a. Locked room
 - b. Device or garment that interferes with individual's freedom of movement and that individual unable to remove easily
 - c. Restraint by treatment facility staff member by use of physical force

§_51.61(1)(i)

- 2) May be used only when less restrictive measures ineffective or not feasible

- 3) Shall be used for shortest time possible
- 4) Patient's status must be reviewed once every 30 minutes
- 5) Facility must have written policy covering use of restraint or isolation that ensures
 - a. Dignity of patient protected
 - b. Safety of patient
 - c. Regular, frequent monitoring by trained staff to care for bodily needs as may be required
- 6) May be used for emergency situations only when likely patient may physically harm self or others
- 7) Treatment director must specifically designate physicians authorized to order isolation or restraint and licensed psychologists authorized to order isolation

Authorization must be in writing except isolation or restraint may be authorized in emergencies for not more than one hour

- 8) No emergency isolation or restraint continued for more than 24 hours without new written order
- 9) Isolation may be used as part of treatment program if part of written treatment plan and rights provided patient
 - a. Explained to patient
 - b. Evaluated at least once every 2 weeks

- 10) Patients who have recent history of physical aggression, or have been transferred from Juv correctional facility, State prison, or Cty jail or house of corrections, may be restrained during transport to or from facility
- 11) Patients committed or transferred under [§ 51.35\(3\)](#) or [§ 51.37](#) or [Ch 971](#) or [Ch 975](#) transferred to hospital for medical care may be isolated for security reasons within locked facilities in hospital
- 12) Patients in maximum security at MMHI may be locked in rooms during night shift and for up to 1-1/2 hours during each change of shift by staff to permit staff review of patient needs
- 13) Patients in maximum security at MMHI may be locked in rooms on unit-wide or facility-wide basis as emergency measure as needed for security
 - a. May only be authorized by director of unit or facility or designee and must be approved within one hour after that by director of MMHI or designee
 - b. Emergency isolation order may only be in effect for period of time needed to preserve order while dealing with situation and may not be used as substitute for adequate staffing
 - c. Status of each patient must be reviewed every 30 minutes
 - If patient in room without toilet, must be given opportunity to use one at least once every hour
 - d. Each unit in maximum security facility at MMHI must have written policy covering use of isolation that ensures
 - Dignity of patient protected
 - Security of patient protected
 - Safety of patient secured
 - Regular and frequent monitoring by trained staff

[§ 51.61\(1\)\(j\)](#)

J. Right not to be subjected to experimental research without express and informed consent of patient and guardian after consultation with independent specialists and Atty

§_51.61(1)(k)

K. Right not to be subjected to drastic treatment procedures without express and informed consent of patient after consultation with Atty and legal guardian, if any

- 1) Drastic treatment includes psychosurgery

*Prof'l Gdnships, Inc v
Ruth EJ (In re Gdnship
of Ruth EJ)*
[196 Wis. 2d 794](#)
(Ct. App. 1995)

- 2) Statute may be unconstitutional deprivation of equal protection or right to life, in cases involving incompetent person

See [GA 2](#), this volume

§_51.61(1)(L)

L. Right to religious worship within facility, if available

§_51.61(1)(m)

M. Right to humane psychological and physical environment within facility

§_51.61(1)(n)

N. Right to confidentiality of treatment records; right to inspect and copy such records; and right to challenge accuracy, completeness, timeliness, or relevance of information in records, as provided in [§_51.30](#)

§_51.45(14)

- 1) Except as provided in [§_51.30](#), records of alcoholism or drug dependence treatment programs and facilities confidential and privileged to patient

- a. Any person who violates [para. 1\)](#) above is subject to forfeiture of not more than \$5,000

§_51.61(1)(o)

O. Right not to be filmed or taped unless signs informed and voluntary consent specifically authorizing filming or taping for particular purpose or project during specified time period

- 1) If patient adjudicated incompetent, guardian may give consent
- 2) Patient at Goodland Hall at MMHI, patient detained or committed under [Ch 980](#), or patient in legal custody of or under supervision of DOC, may be subject to video surveillance or filmed or taped without consent, except not in bedrooms or bathrooms without consent, unless patient is engaged in dangerous or disruptive behavior

[§ 51.61\(1\)\(p\)](#)

P. Have reasonable access to telephone

[§ 51.61\(1\)\(q\)](#)

Q. Permission to use and wear own clothing or be furnished with adequate allowance of clothes if none available; provision to be made for laundering

[§ 51.61\(1\)\(r\)](#)

R. Provision to be made for access to reasonable amount of individual secure storage space for own private use

[§ 51.61\(1\)\(s\)](#)

S. Right to have reasonable protection of privacy in matters such as toileting and bathing

[§ 51.61\(1\)\(t\)](#)

T. Permission to see visitors each day

[§ 51.61\(1\)\(u\)](#)

U. Right to present grievances and communicate without justifiable fear of reprisal

[§ 51.61\(1\)\(v\)](#)

V. Right to use own money as patient chooses, except to extent that authority over money is held by another (e.g., guardian of the estate)

[§ 51.61\(1\)\(w\)](#)

W. Right to be informed in writing of costs of care and treatment that patient or relatives may need to pay

[§ 51.61\(1\)\(x\)](#)

X. Right to be treated with dignity and respect by facility or program employees and by health-care providers

[§ 51.61\(1\)\(y\)](#)

Y. Right to be notified in writing of grievance resolution procedure options if services provided by licensed mental health professional not affiliated with Cty Dept or treatment facility

[§ 51.61\(1\)\(z\)](#)

Z. In [Ch 980](#) commitment case, right to have Cty Dept submit [§ 980.08\(4\)\(dm\)](#) report (for supervised release) within time frame specified in statute

[§ 51.45\(15\)](#)

AA. All legal rights except as provided in [Sec. 3.](#), *infra*

[§ 51.59\(1\)](#)

- 1) Incompetency NOT implied by admission to facility
- 2) Patient retains right to
 - a. Manage affairs
 - b. Contract
 - c. Hold professional, occupational, or motor vehicle operator's licenses
 - d. Marry or obtain a divorce
 - e. Vote
 - f. Make a will
 - g. Exercise any other civil right

[§ 51.45\(13\)\(m\)](#)

BB. Subject may at any time seek to be discharged by habeas corpus proceeding

3. Denial of Certain Rights

[§ 51.61\(2\)](#)

A. Rights guaranteed under [Sec. 2.P.–T.](#), *supra*, may be denied for cause after review by director of facility and may be denied when medically or therapeutically contraindicated as documented by patient’s physician, licensed psychologist, or licensed mental health professional in treatment record

- 1) Patient must be informed in writing of grounds for withdrawal of right
- 2) Patient must have opportunity for review of withdrawal of right in informal hearing before director of facility or designee
- 3) Documentation of grounds for withdrawal of rights must be made in patient’s treatment record
- 4) After informal hearing held, patient or representative may petition for review of denial through use of grievance procedure or, alternatively or in addition to use of such procedure, may bring Ct action for damages

See infra [Sec. 4.](#)

4. Grievance Procedure

[§_51.61\(5\)](#)

A. Grievance procedure

- 1) DHS must establish procedures to ensure protection of rights
- 2) DHS must implement grievance procedure to ensure rights protected and enforced
- 3) DHS-established procedures do not apply to patients in private hospitals or public general hospitals except for patients admitted through DHS or Cty Dept or admitted in accordance with written agreement between DHS or Cty Dept

[§_51.61\(7\)](#)

B. Suit for damages

- 1) Patient who suffers damage as result of unlawful denial or violation of rights may bring action against person, including State or any political subdivision, that unlawfully denies or violates right

Wright v Mercy Hosp

[206 Wis. 2d 449](#)

(Ct. App. 1996)

- a. Patient may recover actual damages and exemplary damages of not less than \$100 for each violation, plus costs and reasonable actual Atty fees

Hess v Fernandez

[2005 WI 19](#), ¶¶ 39, 41

[278 Wis. 2d 283](#)

- b. Patients Compensation Fund (now Health Care Liability and Injured Patients and Families Compensation Fund) “does not provide any treatment and could never violate any of the rights proscribed in §_51.61” and “is not a person within the meaning of §_51.61(7)(a) and, therefore, not subject to the provisions relating to costs and reasonable actual Atty fees”

- 2) Patient may bring action against any person including State or any political subdivision, that willfully, knowingly, and unlawfully denies or violates any rights

- a. Patient may recover actual damages and exemplary damages of not less than \$500 or more than \$1,000 for each violation, together with costs and reasonable actual Atty fees

- Not a prerequisite that patient suffer or be threatened with actual damages

- 3) Patient may bring action to enjoin unlawful violation or denial of rights

May, in same action, seek damages and recover costs and reasonable actual Atty fees if patient prevails

- 4) Use of grievance procedure NOT a prerequisite to bringing action

5. Patients' Records

§_51.30

A. Patient treatment records are confidential

§_54.75

*Wis Voter Alliance v
Reynolds)*

[2023 WI App 66](#)

[410 Wis. 2d 335](#)

Wis Voter Alliance v

Secord

No [2023AP36](#)

2023 WL 8910882

(Wis. Ct. App. 12/27/23)

(unpublished opinion

citable for persuasive

value per §_809.23(3)(b))

(review granted)

All records pertinent to finding of incompetency are closed, including notice of voting eligibility

§_51.30(2)

B. Informed consent for disclosure of information required

1) Informed consent must be in writing and must contain

a. Name of individual, agency, or organization to which disclosure to be made

b. Name of subject whose treatment record being disclosed

c. Purpose or need for disclosure

d. Specific type of information to be disclosed

e. Time period during which consent effective

f. Date on which consent signed

g. Signature of subject or person legally authorized to give consent for the subject

§_51.30(4)(b)

C. Informed consent NOT needed

- 1) For research, auditing, billing purposes

Billy Jo W v Metro
(In re Mental
Condition of Billy Jo W)
[182 Wis. 2d 616](#) (1994)

- 2) Pursuant to lawful order of Ct of record

- 3) For treatment and treatment coordination purposes, where and to whom necessary

- 4) In other circumstances specified in statute ([§ 51.30\(4\)\(b\)](#))

[§ 51.30\(4\)\(d\)](#)

D. Subject's access to treatment records during treatment may be restricted

Subject's access to records of all medications and somatic treatments may not be denied

[§ 51.30\(5\)\(a\)](#)

E. Parent, guardian, or person in place of parent of minor, or guardian of adult adjudicated incompetent may consent to release of confidential information in Ct or treatment records

- 1) Guardian to have access to subject's Ct and treatment records at all times, except in case of minor 14 or older who files written objection to such access

[§ 51.30\(5\)\(e\)](#)

- 2) Temporary guardian may be appointed for purpose of deciding upon release of records

**F. See statute ([§ 51.30](#)) for complete details
of record confidentiality**

See **Criminal/Traffic Benchbook** for
special procedures regarding those persons
committed under [§ 971.14](#) (**CR 12**) and
[§ 971.17](#) (**CR 34**)

